Supreme Court, U. S.
FILED
MAY 31 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 77-1715

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, FRANK BEAL; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representative of all others similarly situated,

Appellants

v.

INSTITUTIONALIZED JUVENILES in Pennsylvania Institutions for the mentally ill and mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania

APPENDIX TO JURISDICTIONAL STATEMENT

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COMPLAINT—NOVEMBER 2, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES, et al.,
Plaintiffs

v.

SECRETARY OF PUBLIC WELFARE, et al.,
Defendants

C.A. No. 72-2272
(formerly captioned Bartley v. Kremens)

PLAINTIFFS' MOTION TO AMEND AND SUPPLEMENT COMPLAINT

Pursuant to Rules 15(a) and 15(d) of the Federal Rules of Civil Procedure, plaintiffs respectfully move the Court for leave to amend and supplement their complaint in this action for the purpose of adding new and proper class representatives and to advise the Court of recent state statutory developments.

After final judgment in this action, the Supreme Court vacated and remanded this Court's Order so that the above matters might be considered. *Kremens v. Bartley*, 97 S.Ct. 1709 (1977).

Defendants' counsel has informed the undersigned that he has no objection and consents to the above requested amendment and supplementation. Plaintiffs do not intend to file any memorandum in support of this motion, unless the Court should request one.

Respectfully submitted,
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November 2, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES, et al.,

Plaintiffs

v.

SECRETARY OF PUBLIC WELFARE, et. al.,

Defendants

C.A. No. 72-2272

CERTIFICATE OF SERVICE

David Ferleger, Esquire, counsel to the plaintiffs, hereby certifies that on the 2d day of November, 1977, he mailed true and correct copies of the Amended and Supplemental Complaint, Motion to Amend and Supplement Complaint, and Interrogatories to the Defendants by first class U.S. mail, postage prepaid, to all counsel herein to the following addresses:

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COMPLAINT—NOVEMBER 2, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES in Pennsylvania institutions for the mentally ill and the mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Plaintiffs

v.

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, Frank Beal; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representative of all others similarly situated,

Defendants

C.A. No. 72-2272
(formerly captioned Bartley v. Kremens)

AMENDED AND SUPPLEMENTAL COMPLAINT

I.
PRELIMINARY STATEMENT

1. Children are persons under the Constitution and laws of the United States and are entitled to their protection.

2. Plaintiffs, individually and on behalf of all others

similarly situated, seek declaratory and injunctive relief for violations of their civil rights resulting from the operation of Pennsylvania statutes which permit their indeterminate confinement in institutions for the mentally ill and mentally retarded under color of state law with no right to notice, hearing, counsel and other procedural safeguards. The statutes are challenged on the ground that they conflict with the plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. The defendants are those state officials who accept and receive into involuntary custody the plaintiffs, minors, upon the request of parents or guardians such as welfare departments and child care agencies.

4. This case has been before the Court as *Bartley v. Kremens*, 402 F.Supp. 1039 (E.D.Pa. 1975), vacated and remanded, 97 S.Ct. 1709 (1977). This amended and supplemental complaint substitutes new class representatives and informs the Court of recent state statutory developments.

II.
JURISDICTION

5. Jurisdiction is conferred upon this Court by 28 U.S.C. 1331 which provides for original federal question jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

6. Jurisdiction is also conferred upon this Court by 28 U.S.C. 1343(3) which provides for original jurisdiction in all suits authorized by 42 U.S.C. 1983 to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States and by federal law. Defendants here act under color of state law.

7. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. 2201, 2202, 2281, 2284, Rules 57 and 65 of the Federal Rules of Civil Procedure, all of which relate to declaratory judgments, injunctions and three-judge courts, and by 42 U.S.C. 1983 and 1988, which relate to civil rights actions.

III.
THREE-JUDGE COURT

8. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 and 2284 since the plaintiffs seek an injunction to restrain defendants, state officials, from the enforcement, execution and operation of portions of state statutes of statewide applicability on the ground that said statutes are contrary to the United States Constitution. This action was filed prior to the enactment of Public Law 94-381, which amended the three-judge court statutes.

IV.
CLASS ACTION ALLEGATION

9. The named plaintiffs bring this action on their own behalf and, pursuant to Rule 23(a) 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all others similarly situated.

10. The members of the class of plaintiffs similarly situated are all persons who are or who may be committed to institutions for the mentally ill and the mentally retarded in Pennsylvania upon application of parents or guardians and without notice, hearing, counsel and other procedural safeguards.

a. Subclass A of plaintiffs includes all those persons under 14 years of age committed under

Section 201 of the Mental Health Procedures Act of 1976.

b. Subclass B of plaintiffs consists of all persons 18 years of age or younger committed under Sections 402 and 403 of the Mental Health and Retardation Act of 1966.

11. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impractical (and the total membership of the class is indeterminate); there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

12. Defendants John Fong, C. Duane Youngberg and Nicholas D'Aluisio, directors of the facilities confining the named plaintiffs, are sued as representative of the class of directors of all mental health and mental retardation facilities in Pennsylvania, all of which are subject to regulation by the defendant Secretary of Public Welfare. All the allegations in Paragraph II are met with respect to this defendant class and those allegations are incorporated here by reference.

13. The questions of law and fact involved are:

a. Are the representative parties, and their class members, committed to mental institutions pursuant to the challenged statutes and without notice, counsel, hearing and other procedural safeguards?

b. Do the defendants operate, execute and enforce the challenged statutes?

c. Are the challenged statutes contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

V.
NAMED PLAINTIFFS

14. The named plaintiffs sue by their next friend and guardian ad litem, appointed by this Court pursuant to Rule 17 of the Federal Rules of Civil Procedure.

15. Due to the stigma of mental hospitalization and a desire to minimize any possible intrusions on their privacy, the named plaintiffs are designated in this complaint by their actual given names and the initial of their surnames. The full names of the plaintiffs are being disclosed to the defendants and their counsel and will, should the Court desire, be filed with the Court.

16. The first group of plaintiffs, those confined at Haverford State Hospital under the Mental Health Procedures Act of 1976, are *all the juveniles age 14 and under committed under Section 201 as of October 31, 1977 to that institution.*

17. The second group of plaintiffs are persons with mental retardation confined under the Mental Health and Mental Retardation Act of 1966, Sections 402 and 403 in two institutions, one near Philadelphia in the eastern part of Pennsylvania and one near Pittsburgh in the west.

First Group of Plaintiffs; Those at Haverford State Hospital

18. Plaintiff Kevin S., born May 2, 1965, is a citizen of Pennsylvania. He is 12 years old.

19. Plaintiff Richard S. is now 13 years old and a citizen of Pennsylvania. He was born on September 24, 1964.

20. Plaintiff James Paul M. is 7 years old, having been born on November 10, 1969. He is a citizen of Pennsylvania.

21. There is no paragraph 21.

22. Plaintiff Raymond C. was born on September 9, 1964, is a citizen of Pennsylvania, and is 13 years old.

23. Plaintiff William B. was born June 18, 1968, is 9 years old and is a citizen of Pennsylvania.

24. Plaintiff Eddie B. was born October 26, 1965, is a citizen of Pennsylvania and is 12 years old.

25. Plaintiff Francis B. was born January 9, 1967, is 10 years old, and a citizen of Pennsylvania.

26. Maria L., plaintiff in this action, was born August 26, 1965, is 12 years old and a citizen of Pennsylvania.

27. Thomas W., born February 14, 1966, is 11 years old and a citizen of Pennsylvania.

Second Group of Plaintiffs; Those at Pennhurst and Polk State Schools and Hospitals

28. Plaintiff Nancy Louise D., born December 10, 1960, is a 16 year old citizen of Pennsylvania.

29. Plaintiff Gina S. was born on July 30, 1961 and is a citizen of Pennsylvania. She is 16 years of age.

30. Plaintiff George S. was born February 10, 1963, is 14 years old, and is a citizen of Pennsylvania.

VI.
DEFENDANTS

31. Defendant Secretary of Public Welfare is the Pennsylvania State official who, in that capacity, has the power and duty to enforce the challenged statutes and all regulations necessary and appropriate to the proper accomplishment of those provisions and to operate and assign functions to all state facilities. See Sections 201(2) and 202(a) of the Mental Health and Mental Retardation Act of 1966, and Section 105 of the Mental Health

Procedures Act of 1976 ("Treatment Facilities"), and 6 Pa.Bull. 2115 at Section 7100.1.2 (definition of "approved facility"). Frank Beal currently occupies that office.

32. Defendant John Fong is the director of Haverford State Hospital and is charged with supervision and administration of the facility. See Sections 102, 203 and 417 of the Mental Health and Mental Retardation Act of 1966. It is to Fong or his delegate that applications for admission, commitment or release of the plaintiffs must be made. Haverford State Hospital is an approved facility under Section 105 of the Mental Health Procedures Act of 1976.

33. Defendants Nicholas D'Aluisio and C. Duane Youngberg are, respectively, directors of the Polk State School and Hospital and the Pennhurst State School and Hospital, both institutions for persons with retardation. They are charged with supervision and administration of those facilities. See Sections 102, 203 and 417 of the Mental Health and Mental Retardation Act of 1966. It is to D'Aluisio, Youngberg or their delegates that applications for admission, commitment or release of the plaintiffs must be made. See Sections 402(b), 403(b) and 403(c) of the Mental Health and Mental Retardation Act of 1966.

VII.
FACTUAL ALLEGATIONS

Haverford State Hospital

34. Haverford State Hospital is an institution for the mentally ill located in a rural area outside Philadelphia, Pennsylvania.

35. The institution's score of buildings cover a large hilly area in one corner of which is Building 14, a build-

ing with two large wards. The west ward houses geriatric patients; the door to it is generally unlocked. The east ward houses juveniles.

26. As of October 31, 1977, there were a total of 12 juveniles in Building 14. Two were committed by juvenile courts, after hearings; ten were committed under the challenged statutes, having been "volunteered" into the institution by parents or guardians.

27. Entry into the Children's Unit in Building 14 is through a door that is kept locked. When a buzzer is rung, a worker inside comes to unlock the door. The door bears a sign which reads, "VISITING HOURS—1:30 - 4:30 Weekends and Holidays. No evening visits. (signed) Dr. Bernard Kanther."

28. The Unit consists of two hallways which cross at a glass-walled nursing station. One hallway continues from the entrance door to a large dormitory area for male patients. Along that hallway are two bare unfurnished rooms used for "seclusion" or "time-out" purposes. The second hall has a large dayroom at one end and, at the other end, a large dormitory for female patients.

29. In the nursing station is a bank of television monitors which are used to surveil the patients in all areas of the Unit, including the halls and dormitories.

30. Adjacent to the building are playing areas fenced in by chain link fences about 12 feet high.

32. Patients, including the plaintiffs, are punished for misbehavior and for disobedience to staff, and for violations of unit rules in a variety of ways including: restriction to the Unit, "meditation" (an enforced period of standing or sitting in the hallway, with the person forbidden to converse or interact with other patients passing to and fro), or "time-out" (lock-up in a bare unfurnished room, including overnight periods, alone).

33. Patients have also been pushed, shoved, slapped and hit by institutional staff with no justification. Patients have been forcibly medicated with intra-muscular injections as punishment for "acting out" and for the convenience of staff. The plaintiffs have been subjected to these conditions.

34. Aides and attendants are given great power and discretion to impose restrictions on the plaintiffs. Often this is done arbitrarily with no opportunity provided for appeal or review of such decisions.

35. Privileges (such as the opportunity to exercise outside), special events, and even some forms of therapy may be denied to plaintiffs for violations of Unit rules.

36. Unit rules include, inter alia, prohibitions against chewing gum, smoking, name-calling, visiting with parents or others in the dormitories.

37. The admission process includes a pre-admission contact or interview with a social worker and other staff (this may be the same day as admission) and an interview of the child by a psychiatrist, recorded in an admission note on the day of admission. The admission note summarizes the factual and psychiatric basis thought to justify the commitment.

Kevin S.

38. Plaintiff Kevin S. was admitted to Haverford State Hospital on July 18, 1977 pursuant to Section 201. He was born May 2, 1965. He was brought to the facility by his mother and the county child care agency.

39. A July 25, 1977 evaluation conducted by the school at which Kevin S. was in the fifth grade provides as a "diagnostic impression" of him:

> Kevin is a very needy, very angry boy who needs a supportive and consistent environment. He is not currently seen as psychotic although there is a tendency toward projection and a lack of controls when anxious. A behavior disorder of childhood is suggested. It should be noted, however,

that the emergence of adolesence with its attendant conflicts and changes will, in all likelihood, throw additional strains upon the defenses of an already disturbed child.

40. Kevin's mother is separated from her husband, who lives in New York. His brother, born in 1963, is in a foster home.

41. Kevin's mother has a history of serious mental illness and hospitalizations. She has also physically abused Kevin. As a result of these problems, most of Kevin's early life (he was born in a mental hospital) was spent in foster homes. Haverford State Hospital's psycho-social history describes the facts in this regard:

> She Kevin's mother has many schizophrenic-type features, such as tangential thinking, flight of ideas, inappropriate laughter and illogical statements. During the pre-admission interview there were several times when Kevin's response was much more appropriate than was his mother's. When we told the Squires that we could set an admission date, Mrs. Squires covered her face with her hands and made loud and wracking sobs for several seconds, then immediately stopped and, with no sign of emotion, exclaimed that Kevin's admission should be the sooner the better! This sort of behavior was rather inappropriate. However, she does have a caring for Kevin and expresses hope and a positive attitude that she and Kevin will be helped.
>
> *Reason for Hospitalization:* Kevin was admitted on a voluntary 201a admission, signed by his mother,.....S. Kevin has a history of much instability within the family. He was born in a state mental hospital, as his mother had requested admission there because she trusted the doctors. He was in a foster home for his first five months while his mother was in the state hospital. He subsequently was in another foster home for a few weeks, when he was seven years old (along with his brother), and again in 1971. He was in another foster home from August 1974, to May, 1975, and in another home for a period of two years. Mrs. Squires would place the children because she physically abused them. She was having emotional and marriage difficulties and could not handle Kevin properly.

42. Shortly before his commitment to the institution, school authorities objected to his behavior there; he was allegedly making wierd noises, refusing to do work, and talking back to teachers. He was suspended from school. At home, his mother felt, he was hyperactive, and spent much time playing by himself.

43. During her fifteen years of marriage, Kevin's mother was in a mental hospital many many time; she attempted suicide twice before her children were born. As with Kevin, she was in a mental hospital when her elder son was born. When pregnant with Kevin, she returned to the hospital and, she told Haverford State Hospital staff, "lied" to get in again.

44. Kevin's brother, thirteen months his senior, had been in a foster home but at the time of Kevin's admission to Haverford was in a foster home in New York under the custody of a county social services department. He too had been in a mental hospital.

45. The impression of the institution social worker was, "It is felt that much of Kevin's problems come from living with a schizophrenic mother and having a very unstable and confused early life." The social worker noted that that Mrs. S actively uses social systems "to the point of abuse."

46. The decision to admit Kevin S. to the institution was made at a meeting at the hospital on July 13, 1977

with hospital staff and a representative of the county child care agency. An admission date of July 18, 1977 was set. No psychiatric report or evaluation was made during that pre-admission interview.

47. After he was admitted, on July 18, 1977, Dr. Mia Marcovici interviewed Kevin S. and filed the following "Admission Note:"

> *REASON FOR ADMISSION:* Difficulties adjusting to school and family (mother). Exhibited bizarre behavior in school that has included making inappropriate sounds and laughing inappropriately.
>
> *MENTAL STATUS:* (Use 2d page if necessary) Kevin is a 12 years, 2 month old boy who was accompanied to the hospital by his mother and Yol Sanders from the Delaware County Child Care Service. He was clean in his appearance and was generally cooperative. He had difficulty sitting still and concentrating on a topic. He was well oriented and spoke in short sentences. It appears that he spends a lot of time in his room building walls or playing with his cars. He has few friends and has difficulties relating to peers. No thought disorder was elicited and denied hallucinations.

The "diagnostic impression" noted after this note was "Withdrawal Reaction of Childhood. 308.1."

48. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, 2d Edition* (hereafter, "DSM-II) defines this diagnosis as follows:

> 308.1* Withdrawing reaction of childhood (or adolescence)*
>
> This disorder is characterized by seclusiveness, detachment, sensitivity, shyness, timidity, and

> general inability to form close interpersonal relationships.

49. There is no indication in the records of Kevin's admission to Haverford State Hospital of his comments or version of the behaviors he was accused of.

Richard S.

50. Richard S. is a Black youth, age 12, who was committed to Haverford State Hospital on June 6, 1966 pursuant to Section 201 by the county child care agency which had and has legal custody of him. He was born on September 24, 1964.

51. There had been a previous attempt to have him admitted to the Adolescent Unit of the same institution but he had not been accepted because of his size and age.

52. Richard S. did not live with his mother until he was two years old (he was under an agency's care) and lived with her at home only until he was four when he was placed in the child care agency's Children's Cottage. He later lived in another institutional home for children and then at a residential school for difficult students, at which he was placed immediately prior to his commitment to the mental hospital.

53. Prior to his admission, a contact was made with the Haverford State Hospital at which the hospital authorities were told that Richard's problems included "running away from Silver Springs, putting glass in eye, striking resident while asleep, shaving head and breaking car windshield."

54. The staff of the school Richard was in recommended hospitalization to the child care agency which, in January, 1977, six months before his admission, wrote to Haverford seeking his commitment.

55. The first psychiatric evaluation recorded for Richard S. in the hospital records is dated June 6, 1977

by Dr. Miz Marcovicci and states as follows:

REASON FOR ADMISSION: Inability to adjust to an open setting. History of self harm and running away.

MENTAL STATUS: (Use 2d page if necessary) Rickey is a well developed, 12 year 8 month old boy. He is clean and neat in his appearance. He is well oriented in all three spheres. Ricky looks down to the floor most of the time. His eye contact is limited and he offers no spontaneous conversation. When asked questions he replies in short sentences. He is relevant and coherent. He appears preoccupied. No bizarre or inappropriate behavior was elicited. No restlessness or fidgitness was noticed. He has a history of low impulse control, self harm, running away and unpredictable behavior.

The diagnostic impression was "Unsocialized Aggressive Reaction of Childhood."

56. This diagnosis is defined in the *DSM-II* as follows:

308.4* Unsocialized aggressive reaction of childhood (or adolescence)*

This disorder is characterized by overt or covert hostile disobedience, quarrelsomeness, physical and verbal aggressiveness, vengefulness, and destructiveness. Temper tantrums, solitary stealing, lying, and hostile teasing of other children are common. These patients usually have no consistent parental acceptance and discipline.

57. The admission records at Haverford do not indicate Richard S's version of the behavior of which he was accused. The only "self harm" indicated is the unexplained reference to "putting glass in eye."

58. Within a few days of admission, Richard S. expressed his desire to leave the institution; no attempt

was made by institution staff to provide him with an attorney or to advise him of steps to take to obtain his release.

59. By October, 1977, his diagnosis was changed to "Withdrawing reaction of childhood", defined above.

60. The institution's doctor at Haverford prescribed the drug Thorazine to be administered by nurses, without further doctor's order, for any aggressive behavior.

James Paul M.

61. James Paul M. was born November 10, 1969 and was admitted at age 7 to Haverford State Hospital under Section 201 on October 17, 1977

62. The admission note by Dr. Elizabeth Cheek states as follows:

REASON FOR ADMISSION: Uncontrollable behavior. Learning disability.

MENTAL STATUS: (Use 2d page if necessary) This eight year old youngster looked cheerful in the beginning but was clinging to the father later on. He was dressed in pair of jeans and a T-shirt. Speech was clear and understandable. There were no abnormalities of gait. Patient was sucking his thumb in the beginning and said, "I am not answering. My Dad will do." He used the phrase "Oh Brother" with a sigh for every sentence. Patient did not sit on a chair for more than 1 minute and changed toys very frequently. Patient was oriented to time, place and person. Pat has vague memories of past but was able to tell about recent things. He cannot remember the immediate things which were asked to repeat. He was short attention span, get frustrated with the toys very easily. Patient was not sure of the side? He did not like the idea of separating from father. Patient gets very anxious if he hears any voice outside. He feels that he should punch everybody if he cannot

get things done. He sat very near the father later on.

The diagnostic impression was "Minimal brain dysfunction, learning disability."

These diagnoses are not defined or listed in the *DSM-II*.

63. On his first day at the institution, the doctor prescribed the use of Thorazine. During Paul's first week, he was placed in a locked bare room alone, on an "as is necessary basis," on the discretion of non-medical staff.

64. Prior to this admission, Paul had been asked to leave school. At home all day, his behavior deteriorated. His mother died about a year ago. His father works all day.

Edward B.

65. Edward B., born October 26, 1965, was committed to Haverford State Hospital on May 9, 1977 by his father. He was referred to the institution by his psychiatrist who, it happens, is also a full-time psychiatrist in another unit at Haverford State Hospital.

66. Five days before admission, the referring psychiatrist and the parents of Edward B. reported to the social worker that the child had "acted out" at home and in the community. The only specific behavior reported or alleged was that he had thrown a rock through a "window that borders the school" in April, 1977.

67. At this pre-admission meeting, the parents further reported that

> they are policing the boy for fear of his running away, hurting self or others. They are quite concerned that an admission might be necessary when he comes for pre-admission 5/29/77 as they live in neighborhood, and the children call Haverford State Hospital a place for "retards or crazies." Neighbors are now suggesting that Ed is responsible for incidents of destruction in the neighborhood.

68. Edward is an adopted child.

69. The admission note by Ora Smith, M.D. of May 9, 1977 states:

> *REASON FOR ADMISSION:* Hyperactive with poor behavioral controls; threatens to hurt himself; feels depressed.
>
> *MENTAL STATUS:* (Use 2d page if necessary) This 11 year old boy is alert, oriented; and anxious and fearful about hospitalization. Has had a long history of disruptive behavior which is partially controlled by medications.

The "diagnostic impression" recorded in this note is as follows: "minimal brain dysfunction, adjustment reaction of childhood."

70. Minimal brain dysfunction is not defined in the *DSM-II*. Adjustment reaction of childhood is defined as follows:

> 307.1* Adjustment reaction of childhood*
>
> Example: Jealousy associated with birth of patient's younger brother and manifested by nocturnal enuresis, attention-getting behavior, and fear of being abandoned.

The *DSM-II* notes that this and certain other diagnoses are "transient situational disturbances" which "occur in individuals without any apparent underlying mental disorders and that represent an acute reaction to overwhelming environmental stress."

71. During the many months of his commitment with a diagnosis indicating a short-term problem, the hospital records and evaluations continued, each month, to state an "anticipated discharge date" of "three months." Paragraphs 84-86 below refer to this plaintiff.

Raymond C.

72. Raymond C., born September 9, 1964, was committed by his father to Haverford State Hospital at age 13 pursuant to Section 201.

73. He was referred to a local mental health clinic by his school. The mental health clinic refered him to Haverford State Hospital for residential treatment evaluation.

74. Raymond C., at the time of his admission, was under the jurisdiction of the Juvenile Court, with a background of stealing minibikes.

75. He was admitted to Haverford State Hospital the day he was first seen at that facility.

76. The admission note, dated September 28, 1977, and reflecting the examination performed on the day of Raymond's admission, states:

> *REASON FOR ADMISSION:* History of uncooperative disruptive and aggressive behavior including run away from school. Problems in community with stealing and destroying property. Has a learning and hearing problem—Admission and evaluation to assist in future planning to meet his needs.
>
> *MENTAL STATUS:* (Use 2d sheet if necessary)
> An alert, sad and anxious immature looking 13 year old. Patient avoids (refuses) any conversation with adults other than his parents. He does not evidence any overt physical deficits other than hearing. He does not display anything suggestive or psychosis. His lack of cooperation at this time prevents doing a desireable mental status examination.

The diagnostic impression was one of a "behavior disorder of childhood" and a non-psychotic organic brain

syndrome with associated speech, hearing and learning disabilities.

77. Raymond C.'s father had a drinking problem. He died on or about October 30, 1977.

William B.

78. Nine years old, William B. was born on June 8, 1968 and was committed to Haverford State Hospital by his father, pursuant to Section 201, on September 21, 1977.

79. William's parents had separated and divorced when he was an infant. About two years prior to his commitment, he began living with his natural father in a home with his stepmother and two stepbrothers.

80. The admission note by Dr. Mia Marcovicci states:

> *REASON FOR ADMISSION:* Uncontrollable behavior; preoccupied with matches, set a rug on fire, turned the gas burners on in the house, throws things out the window.
>
> *MENTAL STATUS:* (Use 2d page if necessary)
> This 9 years, 3 months old boy was referred to Haverford State Hospital by Media Child Guidance Clinic and Dr. Fittie. He has been in therapy for the past few months and recently his behavior has deteriorated. He turned on gas burners in the house, smears feces and has taken away and hid his youngest brother's injectible medication for allergies (the desensitize lotion vaccine).
>
> Billy is well developed and neat in his appearance. He exhibited no separation anxiety from his parents and was spontaneous and talkative. He talked about the boy in his head who tells him to do bad "things". He claims to hear his voice but did not see him. He was restless, anxious and destructible. He exhibited some inappropriate behavior in the office. Billy is well oriented and coherent.

The diagnostic impression was "overanxious reaction of childhood".

81. This diagnosis is defined in the *DSM-II* as follows:

> 308.2* Overanxious reaction of childhood (or adolescence)*
>
> This disorder is characterized by chronic anxiety, excessive and unrealistic fears, sleeplessness, nightmares, and exaggerated autonomic responses. The patient tends to be immature, self-conscious, grossly lacking in self-confidence, conforming, inhibited, dutiful, approval-seeking, and apprehensive in new situations and unfamiliar surroundings.

82. William B.'s life with family members subjected him to a situation of extreme inconsistency, disorganization and lack of structure. His natural mother's lifestyle was erratic and she reportedly abused him. His grandparents have given him affection but their handling of him has also been destructive to his development.

83. His mother and his grandparents were not told of the plans for his commitment; they were informed after he was institutionalized.

Edward B., Further Facts (see paragraphs 65-71 above)

84. Eddie B. was admitted to Haverford State Hospital on May 9, 1977, by his parents, very upset, as he had been tricked into going by his parents. He was committed under Section 201.

85. The admission note indicates the facts surrounding his entry into the institution:

> From the beginning, Eddie was extremely upset and crying. He was totally unprepared for admission to a hospital. On the way, his parents told him they were taking him to a new school as he could not continue in his present one. Mrs. B..... explained that this problem had existed for some time but that he had not been excluded until recently because she was a teacher in that setting and the school had permitted him to remain. To prevent misunderstanding of why he was here, it was pointed out that this was a hospital and that school was a part of the program rather than the primary reason for the children coming. Because Eddie was so upset, I suggested that one of the teachers tell him a little bit about our school so that he could know this part of the program. Although this was done, Eddie heard very little about what was being said because of the way he had been brought for this admission.
>
> Eddie then opened up with many feelings about being tricked into coming by his parents. He expressed feelings about them not caring for him and wanting to get rid of him. Both parents acknowledged that they had "tricked him" because they were fearful he would run away or threaten to hurt himself. They admitted that they had not told him until that morning and had omitted the fact that his was a psychiatric hospital. Eddie's response to this was to make promises that he would change if he could stay home. * * * Eddie continued with his fears of being in a "crazy" hospital and of getting hurt by other patients—both adults and children. He also spoke of the high fences and of being kept in, like a prisoner. * * *

During this admission interview, Eddie was told he would not be permitted home for a home visit for three weeks to a month. He responded, "My God, you're trying to kill me." To comfort him, the doctor suggested that he could go on a trip the next day with the other children. His parents interjected that they did not trust that he would not run away. The doctor then agreed that he would not go on the trip.

86. Eddie was not told during this admission process that the institution would help him obtain a lawyer or any legal assistance.

Francis B.

87. Francis B., born January 9, 1967, was 9½ years old when he was admitted to Haverford State Hospital on August 16, 1976 pursuant to Section 403 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. 4403.

88. This admission was at the request of his father who signed admission forms which were not filled out, which did not list the son's full name (or, on the Section 403 form, any name at all) or any identifying information whatsoever. On September 7, 1976, the father executed a form under the successor statute, Section 201, asking the hospital to commit Francis B. for care and agreeing that the hospital need not release Francis B., even at the father's request, without at least 72 hours notice.

89. Francis B. comes from a disorganized family which has rejected him. As a social history a month before his commitment indicates, "One of the most distressing aspects of this case is the almost total rejection of Frankie by everyone in his family." His father has a drinking problem, the records indicate that the "parents are in need of help also as there is some question here of physical abuse" and, at the pre-admission interview at Haverford, it was apparent that "Frank could no do right in parent's eyes." There are five children in the family, all boys.

90. The admission note of August 16, 1976 by Dr. Mia Marcovicci which records the psychiatric justification for the commitment notes "difficulties adjusting to school" and that Francis B. "has been described as hyperactive . . . clowning in order to get attention." The diagnostic impression was of "Unsocialized aggressive reaction of childhood," a term the official definition of which is noted above at Paragraph

91. After Francis B. was committed, the institution received background an referral material including a psychiatric evaluation which indicated that "The school seems to tolerate this boy fairly well" and that, despute the "hyperactivity" attribution, "I cannot describe him as hyperactive. In the first interview his mother seemed more hyperactive than he did."

Maria L.

92. Maria L., born August 26, 1965, was committed to Haverford State Hospital on April 25, 1977 by her mother pursuant to Section 201.

93. The admission note by Dr. Mia Marcovicci states as follows:

> *REASON FOR ADMISSION:* Difficulties adjusting to school because of aggressive behavior. Difficulties adjusting within the family.
>
> *MENTAL STATUS:* (Use 2d sheet if necessary) Maria is a 11 year 7 month old girl who came today accompanied by her mother. She speaks freely about her aggressive behavior in school and describes the fights she gets into. She does not respond to limits at home.
>
> She is restless and fidgity. She is well oriented and relates well to the examiner. No bizarre or inappropriate behavior was elicited. She claims that she will miss her brother Danny (suffers from muscular dystrophy) because "we get in trouble together". She does not appear remorseful about her behavior.

The dignostic impression was "Unsocialized Aggressive Reaction of Childhood. 308.4"

94. Maria L. has resisted the regimentation and direc-

tions imposed upon her by the institutional staff; one staff note quotes her as saying, during a meeting with staff and her mother, "I don't have to listen to these staff people, they're not my parents."

Thomas W.

95. Thomas W. was committed to Haverford State Hospital on an emergency commitment which was later changed to a commitment under Section 201. He was institutionalized at that facility on June 2, 1977.

96. Born February 14, 1966, Thomas' parents have an unstable marriage. After a severe beating which resulted in his hospitalization in 1975, Thomas' case came to the attention to social service agencies and his mother and stepfather were arrested.

97. The county child care agency, which has custody of Thomas W., committed him to Haverford from the County Juvenile Detention Center where he allegedly were divorced, Gina S. was placed in a county "infants several small fires.

98. The admission note for Thomas W. states the basis the facility used for his commitment:

> *REASON FOR ADMISSION:* Fire setting, rages of 5-6 hours, during which he is assaultive, destructive and sets fires.
>
> *MENTAL STATUS:* (Use 2d page if necessary) Patient is a good looking 11 year old black male who is well dressed. He rapidly became angry as I asked him questions. He admits to fire setting and destructive behavior "because they get on my nerves . . . . they get me mad." He appeared quite bright and was adept at standing up for himself. He has been evicted from school for allegedly exhibiting himself and for sexual behavior toward girls. It is also claimed that he has been involved in sexual behavior with his three year old sister and girls in the neighborhood. He denied any sexual behavior except with a nine year old neighbor girl. He denied insomnia, anorexia, depression and self-destructive ideation. He said that the only person he trusted in his family was his three year old sister.
>
> Child Care Worker says he's repeatedly run away, goes into rages of 5-6 hours, has demolished dresser drawers and several windows, pulled a knife on a cottage staff member, has repeatedly been assaultive and was reported to be grunting and evoking unintelligible verbage last night at the detention center. He has repeatedly complained that he has asthma, chest pain and liver trouble but physical was negative.

99. Scapegoated in the home, the professionals involved in his case feel, Thomas acts out the marital and family conflict in his daily life.

100. On May 31, 1977, just two days prior to his commitment to Haverford, Thomas W. was given a psychiatric evaluation by Dr. John Fong, a defendant in this action. Dr. Fong evaluated Thomas W. not as superintendent of Haverford State Hospital but, at the request of a county judge, in his capacity as consultant to the court. He found the child to be non-psychotic but dangerous. He also found that Thomas W. disputed many of the behaviors he was accused of and explained that some were a response to mistreatment. Dr. Fong recommended family therapy, having been informed that admission was being arranged to a private facility. Haverford State Hospital information at the time of Thomas W.'s commitment, however, erroneously stated that Dr. Fong recommended admission. Despite the involvement of the juvenile court and its jurisdiction over Thomas, no court hearing or judicial authorization for the commitment was ever sought or authorized.

Pennhurst State School and Hospital;
.Polk State School and Hospital

101. Pennhurst State School and Hospital is located in a rural area of Pennsylvania near Valley Forge. Built in the first decade of this century, it is an overcrowded and understaffed institution, unaccredited by the Joint Commission on Accreditation of Hospitals. Residents generally receive little habilitative programming. Institutional life for Pennhurst residents is regimented and unpersonalized. The facility houses about 1200 people. The institution and its staff are defendants in *Halderman v. Pennhurst State School and Hospital,* Civil Action Number 74-1345 (E.D.Pa., Tried April - June, 1977, pending decision).

102. Polk State School and Hospital is located in the rural community of Polk, Pennsylvania, approximately 80 miles from Pittsburgh. It is not served by any public transportation. Now housing about 1700 residents, its rated bed capacity is 1321. Polk was built 80 years ago in 1897; those ancient buildings continue to house the plaintiffs in large dormitory areas, residents sleeping head to head. The institutional conditions are regimented and unpersonalized.

Gina S.

103. Gina S. was committed to Polk State School and Hospital on October 20, 1970 by her mother pursuant to Section 404 of the Mental Health and Mental Retardation Act of 1966, which permitted any two doctors to commit any person upon the certification of said doctors.

104. This statute, Section 404, was declared unconstitutional in 1971 in *Dixon v. Attorney General of Pennsylvania,* 325 F.Supp. 966 (M.D.Pa. 1971) (Three-Judge Court).

105. No legal commitment papers were executed

from 1971 until November 25, 1975 (during which time Gina S. remained at Polk) when the plaintiff's mother applied to the defendant director of the institution for plaintiff's commitment under Section 402 of the Mental Health and Mental Retardation Act of 1966.

106. At the age of 6, in 1967, the year her parents were divorced, Gina S. was placed in a county "infants home." Three years later, in 1970, she was removed by her mother and taken directly to Polk where she has remained since.

107. The certificates of the doctors certifying the need for commitment stated as follows:

> a. Certificate No. 1:
>
> (History of illness) Mongolism since birth with moderate retardation.
> (Physical and Mental Findings at Time of Examination— Px as noted. Has limited speech. Child can handle most personal care. She has (illegible) heart disease.
>
> b. Certificate No. 2:
>
> (History of illness) Down's Syndrome—moderate retardation. Fair speech and recognition.
>
> (Physical and Mental Findings at Time of Examination) Typical mongoloid features with high palate, small fifth digit; also with gingival hypertrophy, loud systolic m.

108. The report of the psychologist which accompanied the doctor's reports reported the facts of her condition as follows:

> (Maturation) Gina is an affectionate and alert little girl of moderate mongoloid appearance. Motor development appears adequate, and she was able to deal with all tasks presented from this standpoint.
>
> (Social Adjustment) Gina was cooperative in

the test setting, sitting quietly but responsive to the examiner's questions. Her speech was hard to understand although some single words were very distinct.

(Names of Tests and Results) Stanford-Binet, form L-M: CA: 9-2; MA: 3-4; IQ: 35.

Gina is functioning in the moderately mentally retarded range of intelligence. She can respond well to concrete verbal direction, and is able to use language denotively.

(Diagnosis) Mongolism, AAMD Classification: 64.

Nancy Louise D.

109. Nancy Louise D. was born in 1960. Both her parents were alcoholics. Both her parents were mentally retarded.

110. In 1961, Nancy Louise was adjudicated a neglected child and placed under the guardianship of the county welfare department which placed her in foster care until May 22, 1968 when she was taken directly from foster care to Polk State School and Hospital.

111. On April 12, 1968, the county welfare director executed an application to the defendant director of Polk for the commitment of Nancy Louise to Polk. This was done under the Pennsylvania Mental Health Act of 1951 (*not* the 1966 Act). The child was committed on May 22, 1968.

112. No commitment forms have ever been executed under the Mental Health and Mental Retardation Act of 1966 by the guardian or by anyone else.

113. The defendant director of Polk purports to maintain the confinement of the plantiff pursuant to Section 402 of the Mental Health and Mental Retardation Act of 1966.

114. The basis for commitment, as described in a

physician's certificate attached to the 1968 application is as follows:

(History of Illness) At age 3½ there was marked retardation—did not walk or talk—began walking at about 4½ years.

(Physical and Mental Findings at Time of Examination) Psych. reports will be submitted—obviously retarded—Physical examination essentially neg. except for poor muscular coordination.

George S.

115. George S., abandoned by his parents, was placed at an early age in the custody of the Philadelphia Welfare Department which, by contract, arranged for Catholic Social Services to provide for his care.

116. Catholic Social Services placed him from the first year of his birth until 6 years later (when he was committed to Pennhurst) with a foster family, Mr. and Ms. C.

117. In 1969, the foster mother was hospitalized and, after her discharge, was temporarily not able to resume care of George. As a temporary measure, George was placed in another foster home; however, because of the crowded conditions in that home, the placement could not be maintained. Catholic Social Services, on behalf of the county welfare department, then applied for and was granted commitment to Pennhurst for a short-term period of 90 days.

118. The days lengthened into years; no placement outside Pennhurst was arranged or obtained despite the fact that George could function in a non-institutional setting.

119. George's foster mother, Ms. S., has maintained continual contact with him and attempted to regain care

of him, only to be rebuffed by the institution and the welfare department for no proper reason.

120. During his commitment at Pennhurst, George has suffered numerous bites, scratches and other injuries. One one ward where he lived, he was frequently tied to a bench; he would attempt to walk anyway, dragging the bench after him. Until the last year before the lawsuit referred to in Paragraph 121 was filed, George was constantly naked or wearing clothes that were not his; he never wore shoes or socks on the bare concrete floors of the ward. Pennhurst officials told the foster mother that they medicated George to keep him quiet. On medication, he would sit and rock, his eyes glassy and his attitude sleepy. Off drugs, he is fine and plays and relates to the world.

121. George S. is a plaintiff in *Halderman v. Pennhurst State School and Hospital,* C.A. No. 74-1345, brought to trial in April-June, 1977.

The Statutory Scheme for the Mentally Ill

122. Subclass A, plaintiffs alleged to be mentally ill, are confined to institutions pursuant to Section 201 of the Mental Health Procedures Act of 1977, hereafter, "Section 201." This law became effective September 7, 1976.

123. Section 201, in relevant part, states:

> A parent, guardian, or person standing in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child.

124. There is no time limitation on the length of a commitment under Section 201.

The Statutory Scheme for the Mentally Retarded

125. The members of Subclass B are confined to institutions pursuant to Sections 402 and 403 of the

Mental Health and Mental Retardation Act of 1966, hereafter, Sections 402 and 403, under a scheme described and dealt with by the Court in the earlier phase of this litigation.

126. Sections 402 and 403 provide that applications for admission/commitment may be made by:

> A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

Section 402(a)(2); Section 403(a)(2) (identical language in both sections).

127. There is no time limitation on the length of commitments under Sections 402 and 403.

Commitments of Other Persons in Pennsylvania

128. Aside from the members of the plaintiff class, other persons committed to Pennsylvania institutions for the mentally ill and the mentally retarded do so either voluntarily on their own personal volition or for short-term emergency care or after a judicial hearing at which they have the rights to notice, appointed counsel, presentation of testimony in their own behalf, confrontation and cross-examination of adverse witnesses, expert assistance, court-ordered outpatient or partial hospitalization instead of in-hospital commitment. Many juveniles are committed under the statutory provisions guaranteeing such procedural protections, including juveniles in plaintiffs' situations.

Department of Public Welfare Regulations

129. On September 1, 1973, during the pendency of this lawsuit, the defendants adopted regulations regarding the commitment of juveniles. published in volume 37, Pennsylvania Bulletin (Sept. 1, 1973). These regulations continue to apply to Subclass B, the plaintiffs who are persons with retardation. These regulations *do not apply*

to Subclass A, those persons committed under Section 201, as allegedly mentally ill.

130. The three plaintiffs technically subject to these regulations are totally unable to benefit thereby, as they are unable to understand the rights stated therein or to exercise them. The applicants for admission (two welfare agencies and a parent) have not and will not utilize those provisions to secure these plaintiffs' rights.

Previous Hospitalization

131. Absolutely none of the named plaintiffs in this action have received mental hospitalization prior to the commitments to the institutions in which they are now confined.

Family Disorganization

132. Families seeking commitment of allegedly handicapped children are characterized by severe stress, dislocation and disharmony. The problems of children are a function of intrafamilial problems and exist in a context of a weakened family structure, with conflict overtly expressed.

133. The juvenile behavior which precipitates institutionalization may be provoked by the parents; there are also many cases where the child may be driven to such behavior by the conflicts in the home.

134. Parents will often seek to institutionalize children for improper reasons. This stems from honest mistakes or ignorance or sometimes from malice or ill will. In a significant number of cases, the parental purpose of bringing a child to residential treatment has been to accuse, punish and separate the child from the home. The motivation is not always good.

135. Parents are not particularly good observers of children's behavior and symptoms and, especially in the context of the high feelings that run in situations of

conflict, parents are not reliable sources of factual information about the child and his or her behavior.

136. Parents who bring their children to psychiatrists for care cannot be objective reporters of the behavioral background of the child. They often exaggerate and misinterpret the actions of their children and may often react antagonistically to their children.

Effects of Institutionalization

137. Institutionalization is a severe deprivation of one's liberty and may be extremely harmful, resulting in what one of the state's witnesses at trial called "an emotional deficiency disease." Barton, *Institutional Neurosis* (2d Ed. 1966); Goffman, *Asylums* (1961); Belknap, *Human Problems of State Mental Hospitals* (1956); Stanton and Schwartz, *The Mental Hospital* (1954); Wing and Brown, *Institutionalization and Schizophrenia* (1970); Vail, *Dehumanization and the Institutional Career* (1966).

138. Institutionalization for mental handicap results in severe social stigma, self-stigmatization, employment and license discrimination and liabilities.

139. In a practical sense, institutionalization may make treatment difficult because of the difficulty in involving the family in treatment and the fact that an institutional setting is less likely to be oriented toward family pathology. As one expert testified on the general ill effects of institutions, "We have to be cognizant of the enormous social toll that institutionalization brings."

Reliance on Psychiatrists Would Be Misplaced

140. The mentally retarded should not be in institutions at all.

141. Psychiatrists can and do err and disagree in making diagnoses and recommendations for institutionalization of plaintiffs.

142. As children who are most likely to be institutionalized are in the lower class, the psychiatrists who evaluate them are at a great distance culturally, classwise and geographically from the situation in which the children are living, and thus the psychiatrists misperceive behavior.

143. Psychiatric evaluations for commitment are short and not conducted over a sufficient period of time. Children are often referred for hospitalization without exploration of less restrictive alternatives. Overcrowded clinics may overrecommend institutionalization.

144. In the stress of the admission interview, a juvenile may not present an accurate picture of his or her mental status and may appear in worse condition than is actually the case.

145. There is pressure on the institutional doctor to agree with any referring psychiatrist's recommendation for institutionalization; the needs of the institution will inevitably affect admission decisions of institutional doctors; the information that largely influences the doctor's decision to commit comes from the parents and any referring psychiatrist.

146. Some psychiatrists may start with a presumption that the person before them is mentally disturbed, thereby leading to a skewed interpretation of the picture presented.

147. Improper evaluations may result from countertransference due to which the psychiatrist may become unable to recognize or to explore the patient's conflict in some situations.

148. There is a tremendous conflict of interest created when psychiatrists are permitted to make institutionalization decisions.

149. Present law permits parents to doctor-shop for doctors who will agree to commit their child.

150. The condiserations detailed above apply as well to the mentally retarded.

Factual Basis of Need for Hearing

151. Because of their immaturity and lack of experience, it is even more important that juveniles receive the protection of a hearing than adults. This is especially true of those persons under 14, who are severely limited in their ability to speak for themselves and of the retarded 18 and under.

152. Assistance of counsel is essential and can help treatment of juveniles and can in no significant way hinder such treatment.

153. Hearings would not be unduly traumatic for juveniles and would not interfere with treatment or the parent-child relation. To the contrary, a hearing would encourage more appropriate resolution of problems and would have a positive and beneficial effect on the child.

154. The opportunity for hearings would not discourage people from seeking treatment for juveniles, but would result in agencies and psychiatrists performing more effectively and in the avoidance of the necessity of hearings in many cases.

VIII.
CAUSE OF ACTION

155. By operation of Section 201 and Sections 402 and 403, plaintiffs and their class are detained and incarcerated involuntarily in mental institutions without the right to notice, the right to a hearing or hearings, the right to counsel and, if indigent, appointment of counsel, the right to present evidence and testimony on their own behalf, the right to subpoena witnesses and documents, the right to confront and cross-examine

witnesses against them and those who wish them to be committed, the right to independent expert examination and assistance, the right to be involuntarily detained only upon the decision of a disinterested and impartial decision-maker, the right to appeal, other procedural safeguards.

156. By operation of the said statutes, and by defendants' action in operating, enforcing and executing the same, plaintiffs and their class are deprived of their life, liberty and property without Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

IX.
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Continue jurisdiction of this cause, and the already-convened three-judge court, and set this case promptly for an expedited hearing;

2. Determine by order, pursuant to Rule 23(c)(1) that this action be maintained as a class action;

3. Enter a final judgment, pursuant to 28 U.S.C. 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the challenged statutes are invalid, void and of no effect on the ground that they violate the Fourteenth Amendment to the United States Constitution;

4. Enter preliminary and final injunctions enjoining defendants from enforcing and executing such statutory provisions;

5. Allow plaintiffs and the guardian ad litem their

costs herein and reasonable attorney and guardian ad litem fees;

6. Grant such additional and alternative relief as may be deemed by the Court appropriate, just, proper and equitable.

Respectfully submitted,
David Ferleger, Esquire
2321 Sansom Street
Philadelphia, Pa. 19103
215—735-8409, 567-2828
Attorney and Guardian
ad Litem for Plaintiffs

November 2, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES in Pennsylvania institutions for the mentally ill and the mentally retarded, namely KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS .; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Plaintiffs

v.

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, Frank Beal; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representative of all others similarly situated,

Defendants

Civil Action No. 72-2272

ANSWER

First Defense

1. *PARAGRAPH ONE* (1) contains legal conclusions to which *NO RESPONSES* are required. However, if they are deemed factual in nature they are denied.

2. *PARAGRAPH TWO* (2) is *ADMITTED* to the extent that it characterizes the form of the action and the manner in which it is brought; all remaining averments are denied.

3. *PARAGRAPH THREE* (3) is *ADMITTED* to the extent that it avers that the defendants are responsible for the custody of the plaintiffs. The characterization of the custody as "involuntary" is a *LEGAL CONCLUSION* to which *NO RESPONSE* is required. However, if it is deemed factual in nature, it is denied.

4. *PARAGRAPH FOUR* (4) is *ADMITTED.*

5. *PARAGRAPH FIVE* (5) is *ADMITTED* to the extent that it purports to characterize the jurisdictional base of this action.

6. *PARAGRAPH SIX* (6) is *ADMITTED* to the extent that it purports to characterize the jurisdictional base of the action. The remaining averment, that defendants acted under color of state law, constitutes a *LEGAL CONCLUSION* to which no response is required. However, if it is deemed factual in nature, it is *DENIED.*

7. *PARAGRAPH SEVEN* (7) is *ADMITTED* to the extent that it purports to set forth the statutes and Federal Rules authorizing plaintiffs' claims for relief.

8. *PARAGRAPH EIGHT* (8) constitutes a *LEGAL CONCLUSION* to which *NO RESPONSE* is required.

9. *PARAGRAPH NINE* (9) is *ADMITTED* to the extent that it purports to characterize the form of this action.

10. *PARAGRAPH TEN* (10) is *ADMITTED* to the extent that it purports to describe the proposed plaintiff class.

11. *PARAGRAPH ELEVEN* (11) is *DENIED.*

12. *PARAGRAPH TWELVE* (12) is *DENIED.*

13. *PARAGRAPH THIRTEEN* (13) is *ADMITTED* to the extent that it purports to set forth the questions of law and fact involved in this action.

14. *PARAGRAPH FOURTEEN* (14) is *ADMITTED.*

15. *PARAGRAPH FIFTEEN* (15) is *ADMITTED* to the extent that it avers the manner in which the plaintiffs bring this action, all remaining factual averments are *denied*.

16. *PARAGRAPH SIXTEEN* (16) is *ADMITTED*.

17. *PARAGRAPH SEVENTEEN* (17) is *ADMITTED*.

18. *PARAGRAPHS EIGHTEEN* (18) through *THIRTY-FIVE* (35) are *ADMITTED*.

26. (Numbered incorrectly in Complaint) *PARAGRAPH TWENTY-SIX* (26) (page 7 of Complaint) is *ADMITTED* except that it is *DENIED* that the plaintiffs' parents "volunteered" the plaintiffs into Haverford State Hospital.

27. (Numbered incorrectly in Complaint) *PARAGRAPH TWENTY-SEVEN* (27) (page 7 of Complaint) is *ADMITTED*.

28. (Numbered incorrectly in Complaint) *PARAGRAPH TWENTY-EIGHT* (28) (page 7 of Complaint) is *ADMITTED* except that it is *DENIED* that "[a] long the hallway are two bare unfurnished rooms. . . .".

29. (Numbered incorrectly in Complaint) *PARAGRAPH TWENTY-NINE* (29) (page 7 of Complaint) is *ADMITTED*.

30. (Numbered incorrectly in Complaint) *PARAGRAPH THIRTY* (30) (page 8 of Complaint) is *ADMITTED*.

32. (Numbered incorrectly in Complaint). *PARAGRAPH THIRTY-TWO* (32) (page 8 of Complaint) is *DENIED*.

33. (Numbered incorrectly in Complaint) *PARAGRAPH THIRTY-THREE* (33) (page 8 of Complaint) is *DENIED*.

34. (Numbered incorrectly in Complaint) *PARAGRAPH THIRTY-FOUR* (34) (page 8 of Complaint) is *DENIED*.

35. (Numbered incorrectly in Complaint) *PARAGRAPH THIRTY-FIVE* (35) (page 8 of Complaint) is *DENIED*.

36. *PARAGRAPH THIRTY-SIX* (36) is *ADMITTED*.

37. *PARAGRAPH THIRTY-SEVEN* (37) is *ADMITTED*.

38. *PARAGRAPH THIRTY-EIGHT* (38) is *ADMITTED*.

39. *PARAGRAPH THIRTY-NINE* (39) is *ADMITTED*.

40. *PARAGRAPH FORTY* (40) is *ADMITTED* except it is *DENIED* that Kevin's brother is in a foster home.

41. *PARAGRAPH FORTY-ONE* (41) is *DENIED*.

42. *PARAGRAPHS FORTY TWO* (42) and *FORTY-THREE* (43) are *ADMITTED* only to the extent that they accurately summarize certain portions of Kevin S's official records at Haverford State Hospital.

44. *PARAGRAPH FORTY-FOUR* (44) is *ADMITTED*.

45. *PARAGRAPH FORTY-FIVE* (45) is *DENIED* as it is an incomplete and therefore inaccurate reference to certain portions of Kevin S.'s official records at Haverford State Hospital.

46. PARAGRAPH FORTY-SIX (46) is *ADMITTED* to the extent that it avers that the decision to admit Kevin S. to Haverford was made on July 13, 1977, and that an admission date of July 18, 1977 was established. All remaining averments are *DENIED*.

47. *PARAGRAPH FORTY-SEVEN* (47) is *ADMITTED*.

48. *PARAGRAPH FORTY-EIGHT* (48) is *DENIED* as being incomplete and therefore inaccurate.

49. *PARAGRAPH FORTY-NINE* (49) is *DENIED.*

50. *PARAGRAPH FIFTY* (50) is *DENIED.*

51. *PARAGRAPH FIFTY-ONE* (51) is *DENIED.*

52. *PARAGRAPH FIFTY-TWO* (52) is *ADMITTED* only to the extent that it accurately summarizes certain portions of Richard S.'s official records at Haverford State Hospital.

53. *PARAGRAPH FIFTY-THREE* (53) is *DENIED.*

54.-55. *PARAGRAPHS FIFTY-FOUR* (54) and *FIFTY-FIVE* (55) are *ADMITTED.*

56. *PARAGRAPH FIFTY-SIX* (56) is *DENIED* as being incomplete and therefore inaccurate.

57.-58. *PARAGRAPHS FIFTY-SEVEN* (57) and *FIFTY-EIGHT* (58) are *DENIED.*

59. *PARAGRAPH FIFTY-NINE* (59) is *ADMITTED.*

60. *PARAGRAPH SIXTY* (60) is *DENIED.*

61.-62. *PARAGRAPHS SIXTY-ONE* (61) and *SIXTY-TWO* (62) are *ADMITTED.*

63. *PARAGRAPH SIXTY-THREE* (63) is *DENIED.*

64. *PARAGRAPH SIXTY-FOUR* (64) is *ADMITTED* only to the extent that it accurately summarizes certain portions of Richard S.'s official records at Haverford State Hospital.

65. *PARAGRAPH SIXTY-FIVE* (65) is *ADMITTED* except that it is *DENIED* that Edward B.'s psychiatrist is "also a full-time psychiatrist in another unit at Haverford State Hospital".

66.-67. *PARAGRAPH SIXTY-SIX* (66) and *SIXTY-SEVEN* (67) are *DENIED* as incomplete and therefore inaccurate summaries of certain portions of Edward B.'s official records at Haverford State Hospital.

68.-69. *PARAGRAPHS SIXTY-EIGHT* (68) and *SIXTY-NINE* (69) are *ADMITTED.*

70. *PARAGRAPH SEVENTY* (70) is *DENIED* as being incomplete and therefore inaccurate.

71. *PARAGRAPH SEVENTY-ONE* (71) is *DENIED* except that it is *ADMITTED* that paragraphs 84-86 refer to this plaintiff.

72. *PARAGRAPH SEVENTY-TWO* (72) is *ADMITTED* except that it is *DENIED* that Raymond C. was committed by his father to Haverford State Hospital.

73. *PARAGRAPH SEVENTY-THREE* (73) is *ADMITTED.*

74. *PARAGRAPH SEVENTY-FOUR* (74) is *DENIED.*

75.-76. *PARAGRAPHS SEVENTY-FIVE* (75) and *SEVENTY-SIX* (76) are *ADMITTED.*

77. *PARAGRAPH SEVENTY-SEVEN* (77) is *DENIED.*

78.-80. *PARAGRAPHS SEVENTY-EIGHT* (78) through *EIGHTY* (80) are *ADMITTED.*

81. *PARAGRAPH EIGHTY-ONE* (81) is *DENIED* as being incomplete and therefore inaccurate.

82. *PARAGRAPH EIGHTY-TWO* (82) is *ADMITTED* only to the extent that it accurately summarizes certain portions of William B.'s official records at Haverford State Hospital.

83. *PARAGRAPH EIGHTY-THREE* (83) is *DENIED* in that the defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

84.-85. *PARAGRAPHS EIGHTY-FOUR* (84) and *EIGHTY-FIVE* (85) are *DENIED.*

86.-87. *PARAGRAPHS EIGHTY-SIX* (86) and *EIGHTY-SEVEN* (87) are *ADMITTED.*

88. *PARAGRAPH EIGHTY-EIGHT* (88) is *DENIED.*

89.-90. *PARAGRAPHS EIGHTY-NINE* (89) and *NINETY* (90) are *ADMITTED* only to the extent that they accurately summarize certain portions of Francis B.'s official records at Haverford State Hospital.

91. *PARAGRAPH NINETY-ONE* (91) is *DENIED.*

92.-93. *PARAGRAPHS NINETY-TWO* (92) and *NINETY-THREE* (93) are *ADMITTED.*

94. *PARAGRAPH NINETY-FOUR* (94) is *DENIED* as being incomplete and therefore inaccurate.

95. *PARAGRAPH NINETY-FIVE* (95) is *ADMITTED.*

96.-97. *PARAGRAPHS NINETY-SIX* (96) and *NINETY-SEVEN* (97) are *ADMITTED* only to the extent that they accurately summarize certain portions of Thomas W.'s official records at Haverford State Hospital.

98. *PARAGRAPH NINETY-EIGHT* (98) is *ADMITTED.*

99. *PARAGRAPH NINETY-NINE* (99) is *DENIED.*

100. *PARAGRAPH ONE HUNDRED* (100) is *DENIED.*

101. *PARAGRAPH ONE HUNDRED AND ONE* (101) is *DENIED* except that it is *ADMITTED* that Pennhurst State School and Hospital is located in a rural area of Pennsylvania near Valley Forge, and that it originated in the first decade of this century and is currently unaccredited by the Joint Commission on Accreditation of Hospitals.

102. *PARAGRAPH ONE HUNDRED AND TWO* (102) is *ADMITTED* to the extent that it avers that Polk

State School and Hospital is located in the rural community of Polk, Pennsylvania, approximately 80 miles from Pittsburgh and originated in 1897. All remaining averments are *DENIED.*

103.-116. *PARAGRAPHS ONE HUNDRED AND THREE* (103) through *ONE HUNDRED AND SIXTEEN* (116) are *ADMITTED* only to the extent that they accurately summarize certain portions of the specified plaintiffs' official records at Polk State School and Hospital.

117. *PARAGRAPH ONE HUNDRED AND SEVENTEEN* (117) is *ADMITTED* only to the extent that it accurately summarizes certain portions of George S.'s official records at Pennhurst State School and Hospital except that it is denied that Catholic Social Services was granted a "commitment to Pennhurst for a short-term period of 90 days."

118. *PARAGRAPH ONE HUNDRED AND EIGHTEEN* (118) is *DENIED.*

119.-120. *PARAGRAPHS ONE HUNDRED AND NINETEEN* (119) and *ONE HUNDRED AND TWENTY* (120) are *DENIED.*

122.-129. *PARAGRAPHS ONE HUNDRED AND TWENTY-TWO* (122) through *ONE HUNDRED AND TWENTY-NINE* (129) constitute legal conclusions and therefore require *NO RESPONSES.*

130. *PARAGRAPH ONE HUNDRED AND THIRTY* (130) is *DENIED.*

131. *PARAGRAPH ONE HUNDRED AND THIRTY-ONE* (131) is *ADMITTED.*

132.-156. *PARAGRAPHS ONE HUNDRED AND THIRTY-TWO* (132) through *ONE HUNDRED AND FIFTY-SIX* (156) constitute legal conclusions and therefore require *NO RESPONSE*, if however, they should be deemed factual in nature, they are *DENIED.*

Second Defense

Plaintiffs' claims must be dismissed inasmuch as there is not sufficient "state action" to implicate the Due Process Clause of the Fourteenth Amendment.

Third Defense

Plaintiffs have failed to state a claim for which relief may be granted.

Fourth Defense

This Court lacks jurisdiction over the subject matter of this action.

Fifth Defense

The classes proposed by plaintiff should not be allowed in that juveniles who have been admitted by public welfare cannot adequately represent those unnamed juveniles who have been admitted by their parent or parents.

Sixth Defense

This case should not be maintained as an action against a class of defendants.

Seventh Defense

Plaintiffs have failed to exhaust adequate statutory remedies available to them under state law.

WHEREFORE, defendants request that the complaint be dismissed and that judgment be entered in their favor.

NORMAN J. WATKINS
Deputy Attorney General
ROBERT B. HOFFMAN
Assistant Attorney General

J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES, et al.,
Plaintiffs

v.

SECRETARY OF PUBLIC WELFARE, et al.,
Defendants

C. A. No. 72-2272

CERTIFICATE OF SERVICE

AND NOW, this 28th day of November, 1977, I, Norman J. Watkins, Deputy Attorney General for the Commonwealth of Pennsylvania, attorney for defendants, hereby certify that on Monday, November 28, 1977, I served the Answer by depositing said document in the United States Mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

David Ferleger, Esquire
2321 Sansom Street
Philadelphia, PA 19103

NORMAN J. WATKINS
Deputy Attorney General

COMPLAINT—MAY 25, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES in Pennsylvania institutions for the mentally ill and the mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S.; by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated

v. Plaintiffs

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representatives of all others similarly situated

Defendents

CIVIL ACTION NO. 72-2272

OPINION AND ORDER

Before Honorable John J. Gibbons, Circuit Judge and Honorable Daniel H. Huyett, 3rd and Honorable Raymond J. Broderick, District Judges

HUYETT, J. MAY 25, 1978

I. *Introduction*

In 1975, this Court convened as a three-judge federal court pursuant to 28 U.S.C. § 2281[1] held that certain

[1] 28 U.S.C. § 2281 (1970) provided that an application for an injunction against the enforcement of a state statute on grounds of unconstitutionality must be heard by a three-judge district court. This provision was repealed on August 12, 1976.

provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (1966 Act) providing for voluntary commitment and admission to mental health facilities were unconstitutional.[2] *Bartley v. Kremens,* 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded* 431 U.S. 119 (1977). We concluded that these provisions

[2] Sections 402 and 403 of the 1966 Act provide in part:

Section 402. Voluntary admission; application, examination and acceptance; duration of admission.

(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application has been made under the provisions of Section 402 (a) (2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of Section 402 (a) (2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

Section 403. Voluntary commitment; application, examination and acceptance; duration of commitment.

(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in

failed to provide juveniles committed to mental health facilities with specific procedural rights guaranteed by the Fourteenth Amendment to the Constitution which could not be waived by parents, guardians, or persons standing *in loco parentis.*

The Surpeme Court vacated and remanded this case for further consideration in view of the passage by the Pennsylvania Legislature of the Mental Health Procedures Act of 1976 (1976 Act). 50 P.S. §§ 7101-7503 (Supp. 1977-78). The passage of the 1976 Act mooted the claims of the named plaintiffs[3] and, in addition, created distinctions, at least with respect to the governing statutory enactments, between mentally retarded and mentally ill juveniles. It was the Supreme Court's opinion that, in view of these new statutory distinctions, the class action originally approved no longer met the requirements of Fed.R.Civ.P. 23(a). The Supreme Court therefore remanded "for consideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." 431 U.S. at 135.

II. *Statutory Scheme*

We first consider the contours of the statutory scheme governing voluntary admissions and commitments of juveniles. A description of the statutory scheme is important in order to structure properly the subclasses to be maintained pursuant to Rule 23. Furthermore, a full understanding of the statutes is necessary to our determination of whether they satisfy the requirements of procedural due process.

need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, or after the applicant or his successor has given written notice of intention or desire to remove the detained person.

[3] Under the 1976 Act, juveniles age fourteen and older are given essentially the same rights as are given to adults. The named plaintiffs in the original suit were all age fourteen or older; thus, they no longer had a live claim following the passage of the 1976 Act. *See Kremens v. Bartley,* 431 U.S. 119, 126-27 (1977).

A. *The Mental Health Procedures Act of 1976 (1976 Act)*

The 1976 Act repeals the provisions of the 1966 Act except as they relate to mentally retarded persons. Article II of the 1976 Act articulates the procedures for voluntary inpatient treatment of mentally ill persons. "Inpatient treatment" includes all treatment that mandates full or part-time residence in a mental health facility.[4] Section 201 provides that "a parent, guardian, or person standing in loco parentis to a child less than 14 years of age" may apply for voluntary examination and treatment, and by so doing shall be deemed to act on behalf of the child.[5] Once a juvenile is accepted for voluntary examination

[4] Section 103 of the 1976 Act provides as follows:

This act establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. "Inpatient treatment" shall include all treatment that requires full or part-time residence in a facility. For the purpose of this act, a "facility" means any mental health establishment, hospital, clinic, institution, center, day care center, base service unit, community mental health center, or part thereof, that provides for the diagnosis, treatment, care or rehabilitation of mentally ill persons, whether as outpatients or inpatients.

50 P.S. § 7103 (Supp. 1977-78).

[5] Section 201 of the Act provides as follows:

Any person 14 years of age or over who believes that he is in need of treatment and substantially understands the nature of voluntary commitment may submit himself to examination and treatment under this act, provided that the decision to do so is made voluntarily. *A parent, guardian, or*

and treatment the 1976 Act requires that "an individualized treatment plan [be] formulated by a treatment team" within seventy-two hours.[6] The treatment plan must state whether inpatient treatment is necessary and, if so, the reasons for that conclusion.

Section 206 of the 1976 Act sets forth the procedures for withdrawal from voluntary inpatient treatment.[7] Where the person committed is under the age of fourteen,

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person standing in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child. Except as otherwise authorized in this act, all of the provisions of this act governing examination and treatment shall apply.

50 P.S. § 7210 (Supp. 1977-78) (emphasis added).

[6] Section 20 of the Act provides as follows:

Upon acceptance of a person for voluntary examination and treatment he shall be given a physical examination. Within 72 hours after acceptance of a person an individualized treatment plan shall be formulated by a treatment team. The person shall be advised of the treatment plan, which shall become a part of his record. The treatment plan shall state whether inpatient treatment is considered necessary, and what restraints or restrictions, if any, will be administered, and shall set forth the bases for such conclusions.

50 P.S. § 7205 (Supp. 1977-78).

[7] Section 206 of the Act provides as follows:

(a) A person in voluntary inpatient treatment may withdraw at any time by giving written notice unless, as stated in section 203, he has agreed in writing at the time of his admission that his release can be delayed following such notice for a period to be specified in the agreement, provided that such period shall not exceed 72 hours.

(b) If the person is under the age of 14, his parent, legal guardian, or person standing in loco parentis may affect his release. If any responsible party believes that it would be in the best interest of a person under 14 years of age in voluntary treatment to be withdrawn therefrom or afforded treatment constituting a less restrictive alternative, such party

his parent, legal guardian or person standing *in loco parentis* may obtain his release. In addition, "any responsible party" who believes that it would be in the best interests of the juvenile to be withdrawn from inpatient treatment may petition the Juvenile Division of the court of common pleas of the county in which the juvenile resides and request withdrawal or modification of treatment. Then the court must appoint counsel for the child and schedule a hearing within ten days to determine "what inpatient treatment, if any, is in the minor's best interest." 50 P.S. § 7206(b).

B. *Mental Health and Mental Retardation Act of 1966 (1966 Act)*

The 1966 Act was the focus of the original *Bartley* decision in which this Court declared sections 402 and 403 of that Act to be unconstitutional.[8] Following the

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may file a petition in the Juvenile Division of the court of common pleas for the county in which the person under 14 years of age resides, requesting a withdrawal from or modification of treatment. The court shall promptly appoint an attorney for such minor person and schedule a hearing to determine what inpatient treatment, if any, is in the minor's best interest. The hearing shall be held within ten days of receipt of the petition, unless continued upon the request of the attorney for such minor. The hearing shall be conducted in accordance with the rules governing other Juvenile Court proceedings.

(c) Nothing in this act shall be construed to require a facility to continue inpatient treatment where the director of the facility determines such treatment is not medically indicated. Any dispute between a facility and a county administrator as to the medical necessity for voluntary inpatient treatment of a person shall be decided by the Commissioner of Mental Health or his designate.

50 P.S. § 7206 (Supp. 1977-78).

[8] For the text of section 402 and 403 of the 1966 Act, *see* note 2 *supra*.

passage of the 1976 Act, only mentally retarded juveniles remain within the ambit of the 1966 Act. Sections 402 and 403 provide, in brief, that mentally retarded juveniles age eighteen or younger may be admitted or committed[9] to a mental health facility upon the application of a parent, guardian, or person standing *in loco parentis*, and may withdraw only with the consent of the admitting party or his successor.

C. *1973 Regulations*

The 1973 Regulations, promulgated by the Secretary of Public Welfare under the provisions of the 1966 Act, augment the procedural rights given to mentally retarded

[9] As the Supreme Court noted, 431 U.S. at 124 n. 4, neither party has read the statute as containing a distinction between juveniles who are *admitted* voluntarily under section 402 and those who are *committed* voluntarily under section 403.

[10] The 1973 regulations provide in part:

1. All juveniles aged 18 and younger to be admitted to an Institution must be referred from a recognized medical facility, Mental Health/Mental Retardation therapist or Mental Health Agency; however, mentally retarded juveniles may be referred by either a pediatrician, or general physician or psychologist;
2. This referral must be accomplished by a psychiatric evaluation and that report must indicate with specificity the reasons that the person requires institutional care; however, a medical or psychological evaluation may accompany the referral of a mentally retarded juvenile;
3. The Director of the Institution or his delegate, shall have conducted an independent examination of the proposed juvenile, and if his results disagree with the professional's opinion, the Director, or his delegate shall discharge the juvenile;
4. The telephone number and address of the juvenile's parents or the person who is requesting admission for the juvenile must accompany the referral;
5. Within 24 hours after the juvenile's admission, every youth who is at least 13 years of age must receive written notification (which he signs) explaining his rights indicating that he will be given a status report periodically of his condition; that he can contact by telephone or by mail his parents or the person who requested his admission; and that he will be furnished with the number of counsel (Public Defender's number; Legal Services) that he can call for representation. An appropriate person shall explain this notice (attached);
6. In the event that a juvenile whose chronological age is 13 or older objects (either orally or in writing) to remaining in the Institution, the Director, or his delegate, if he feels it is necessary for the youth to remain, may continue the institutionalization for two business days during which time he shall notify the applicant and the referral unit so that either party may institute a 406 proceeding. During that same two-day period, the Director, or his delegate, shall notify the Public Defender's Office or notify Legal Services readily available of the juvenile's need for legal representation. If a 406 proceeding is begun during the two-day period, the juvenile shall remain institutionalized. If the applicant cannot be located and the Director, or his delegate, feels that the juvenile does not require institutionalization, the Director, or his delegate, shall direct the Base Service Unit to assume responsibility of providing for the juvenile's aftercare. However, if the Director, or his delegate, feels that the juvenile requires institutionalization, he shall direct the Base Service Unit to file a 406 proceeding within two days after failure to locate the applicant;
7. The juvenile's counsel shall be furnished with the juvenile's evaluation from the referral unit, with a psychiatric evaluation from the Institution, and with a written report of the reasons to institutionalize the juvenile;
8. If the staff member of the facility giving notice to the patient determines that the patient is incapable of understanding the notification, it shall be written on the notification.

juveniles by the 1966 Act.[11] Portions of the regulations apply to all juveniles aged eighteen and younger, such as the requirement that juveniles admitted to a mental health institution be referred by a mental health professional, pediatrician, general physician, or psychologist; that this referral include a psychiatric, medical or psychological evaluation stating specifically the reasons

[11] The parties have stipulated that the 1973 Regulations presently apply only to juveniles committed as mentally retarded under the 1966 Act. Supplementary Exhibit No. 13, Stipulation No. 38.

why the juvenile requires institutional care;[12] and that the Director of the Institution conduct an independent examination of the juvenile prior to admission.

Additional rights are available to mentally retarded juveniles thirteen years of age or older. These juveniles receive written notification explaining their rights and furnishing them with the number of counsel whom they may call for representation. If a juvenile age thirteen or older objects to remaining at the institution, a commitment hearing must be held pursuant to the procedures provided for involuntary commitment.[13] We note here, as we did in the original *Bartley* opinion, that the regulations designate no time by which a post-commitment hearing must be held. 402 F. Supp. at n. 5.

In sum, there are two completely distinct statutory schemes which are under attack in this lawsuit; one relating to the mentally retarded (1966 Act as modified by the 1973 Regulations) and one relating to the mentally ill (1976 Act). Furthermore, with respect to mentally retarded juveniles, older juveniles are given some rights not accorded the younger juveniles.

III. *Named Plaintiffs*

There are twelve named plaintiffs in this lawsuit. Nine are mentally ill juveniles, age thirteen or younger, who were committed to mental health institutions pursuant to the 1976 Act.[14] The remaining named plaintiffs

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[12] *But see* note 55 *supra.*

[13] The procedures for emergency commitment and civil court commitment of mentally retarded juveniles are contained in sections 405 and 406 of the 1966 Act. 50 P.S. §§ 4405 and 4406. These sections are not challenged in this lawsuit.

[14] Four of the mentally ill juveniles have been discharged from Haverford State Hospital since the filing of the amended complaint. At the hearing held March 31, 1978, counsel for the Commonwealth moved for the dismissal of the claims of these plaintiffs on mootness grounds. However, we believe that these claims are not moot. *See Souder v. McGuire,* 423 F. Supp. 830 (M.D. Pa. 1976); *Meisel v. Kremens,* 405 F. Supp. 1253, n. 2 (E.D. Pa. 1975). These plaintiffs retain an interest in receiving declaratory relief, since the possibility remains that they could at any time be recommitted to a mental health facility under the challenged statutes.

are mentally retarded juveniles, age fourteen or older, institutionalized under the 1966 Act and the 1973 Regulations.[15] .

Plaintiff Kevin S., age twelve, was admitted to Haverford State Hospital (Haverford) on July 18, 1977, pursuant to section 201 of the 1976 Act. Kevin's medical records reveal that his mother, who is separated from his father, has a history of serious mental illness, including incidents of hospitalization. Consequently, much of Kevin's youth has been spent in foster homes.

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[15] The named plaintiffs' medical records were offered into evidence at the hearing. Each plaintiff's records are divided into two portions: Part A consists of pre-admission background information, and Part B contains records from and including the actual admission note through the first staff conference. There was no objection to Part B, and those portions of each child's records were admitted into evidence. However, Part A was objected to by the plaintiffs on relevance grounds. Since there was no showing that these records were in the hands of the admitting officials and used by them at the time of the admissions, plaintiffs objected to the relevance of using these records to demonstrate that the defendant institutions engaged in a complete evaluative process prior to the decision to admit. We took the issue of the admissibility of these records under advisement.

Defendants subsequently submitted with their Supplemental Brief affidavits confirming the fact that virtually all of the information was received by the admitting facilities prior to admission. However, there still is little evidence showing in what way, if at all, these records were used during the admissions process. Plaintiffs have suggested that the material be admitted for the limited purpose of providing information on the social and family backgrounds of the named plaintiffs. After examining these records carefully and considering the memoranda submitted by counsel, we believe that Part A of each of the medical records is relevant to issues in this case and admit those portions into evidence.

Prior to his commitment to Haverford, Kevin came to the attention of school authorities because of his inappropriate behavior, such as "making weird noises, refusing to do work, and talking back to teachers." A consulting school psychiatrist diagnosed Kevin as a "disturbed child" and recommended placement in Haverford. Kevin's psychological evaluation, performed after his admission to Haverford, describes him as a "very needy, very angry boy" who was "not currently seen as psychotic, although there is a tendency toward projection and a lack of controls where anxious." His Admission Note, also prepared after his admission, gives as the "reason for admission:" "Difficulties adjusting to school and family (mother). Exhibited bizarre behavior in school that has included making inappropriate sounds and laughing inappropriately." Kevin's psychological history concludes, "It is felt that much of Kevin's problems come from living with a schizophrenic mother and having a very unstable and abused early life."

Richard S., age thirteen, was committed to Haverford by the county child care agency on June 6, 1976 pursuant to section 201 of the 1976 Act. Richard has spent almost all of his life in foster homes and residential homes for difficult children, with the exception of a two-year period between the ages of two and four. His Admission Note for Haverford states, as a reason for admission: "Inability to adjust to an open setting. History of self harm and running away."

Plaintiff James Paul M., age eight, was admitted to Haverford on October 17, 1977, under section 201 of the 1976 Act. His mother had died approximately one year before his admission to Haverford. The stated "reason for admission" to Haverford was "uncontrollable behavior" and "learning disability."

Plaintiff Raymond C., age thirteen, was admitted to Haverford on September 28, 1977, purusant to section 201 of the 1976 Act. Raymond was admitted initially for purposes of "evaluation." The reason given for his admission was "History of uncooperative disruptive and aggressive behavior including run [sic] away from school. Problems in community with stealing and destroying property. Has a learning and hearing problem."

William B., age nine, was committed to Haverford by his father pursuant to section 201 of the 1976 Act on September 21, 1977. For about two years prior to his commitment, William had been living with his natural father, stepmother, and two stepbrothers. The stated reason for his hospitalization was William's "uncontrollable behavior; preoccupied with matches, set a rug on fire, turned the gas burners on in the house, throws things out the window."

Twelve year old Edward B. was committed to Haverford on May 9, 1977 pursuant to section 201 of the 1976 Act. He has subsequently been discharged from Haverford. Hospital records show that Edward was not informed that he was to be admitted to a mental health facility prior to his admission date, but rather was told that his parents were taking him to a new school. He was extremely upset by the admission process, expressing fears about being in a hospital with "crazies" and being confined "like a prisoner." The stated reason for his admission was that Edward was "Hyperactive with poor behavioral control; threatens to hurt himself; feels depressed."

Plaintiff Francis B., age ten, was originally admitted to Haverford pursuant to section 403 of the 1966 Act on August 16, 1976. Subsequently, on September 7, 1976, Francis' father executed a form committing Francis to inpatient treatment pursuant to section 201 of the 1976 Act. While no "reason for admission" is given in the Admission Note, the examining physician stated that Francis had "difficulties adjusting to school" and that he has been described as "hyperactive with short atten-

tion span." Francis B. has subsequently been discharged from Haverford.

Plaintiff Maria L., age twelve, was admitted to Haverford on April 25, 1977, pursuant to section 201 of the 1976 Act. The Admission Note states that she was admitted because of "difficulties adjusting to school because of aggressive behavior . . . [and] difficulties adjusting within the family." Maria has subsequently been discharged from Haverford.

Plaintiff Thomas W. is eleven years old. He was originally committed to Haverford under section 302 of the 1976 Act (Involuntary Emergency Examination and Treatment), which was subsequently changed to a section 201 commitment. The stated reason for admission was Thomas' violent behavior. Thomas has since been discharged from Haverford.

The three remaining named plaintiffs are committed to institutions for mentally retarded pursuant to the 1966 Act. Plaintiff Nancy Louise D., age seventeen, was admitted to Polk State School and Hospital (Polk)[16] and is being confined pursuant to the terms of the 1966 Act. She was living in a foster home until institutionalized on May 22, 1968. Nancy Louise is categorized as being moderately retarded.

Plaintiff Gina S., age sixteen, was admitted to Polk on October 20, 1970 by her mother. She is currently being confined under section 402 of the 1966 Act. Gina's medical records state that she is functioning in the moderately retarded range of intelligence.

Plaintiff George S., age fourteen, was admitted to Pennhurst State School and Hospital (Pennhurst) on November 5, 1969, under the voluntary admission provisions of the 1966 Act in response to a request by Catholic Social Services. Prior to his admission to Pennhurst, he had been living in a foster home until his foster mother became unable to care for him. George is classified as being severely retarded.

[16] Nancy Louise D. was admitted to Polk on May 22, 1968. Her application form for admission shows that she was admitted under the authority of the Mental Health Act of 1951, rather than the 1966 Act then in effect.

IV. *The Class*

The Supreme Court cautioned that "careful attention must be paid to the differences between the mentally ill and mentally retarded, and between the young and the very young." 431 U.S. at 135-36. In response, we have painstakingly reviewed the testimony given at trial and considered as well the supplementary evidence submitted to us on remand.[17] On the basis of the record before us, we find as follows.

As the Supreme Court noted, there are major differences between the mentally ill and the mentally retarded. Mental illness is a term which covers a plethora of problems ranging from severe withdrawal and psychosis to emotional problems which are situationally based.[18] Mentally retarded persons, on the other hand, are defined as those with substantial intellectual subnormalities, coupled with impairments in adaptive behavior origi-

[17] The parties stipulated as follows:

> The evidence which was admitted in the initial proceeding, including all testimony, depositions, exhibits, interrogatories, objections and rulings shall be deemed included in the record of these proceedings. Further, for the convenience of the parties and the Court, the printed Appendix, which was used in the Supreme Court, No. 75-1064, with permission of this Court shall be used in these proceedings.

Stipulation of Counsel No. 40, Supplementary Exhibit No. 40.

We accept the Stipulations of Counsel and incorporate them into our findings.

[18] Testimony of J. Feiner, Appendix at 467a, *Kremens v. Bartley*, 431 U.S. 119 (1977) [hereinafter cited as Appendix].

nating in the developmental period.[19] Approximately three percent of the population, or two to three million persons, are classified as mentally retarded. Eighty to eighty-five percent of those are only mildly retarded; however, even those who suffer from a minor impairment are at times institutionalized.[20] Despite these differences between mental illness and mental retardation, the testimony reveals that, with respect to many of the crucial factors which this court must consider in determining procedural due process requirements, there is little difference between the two groups.

First of all, a similar kind of stigma attaches to institutional commitment whether the juvenile is classified as mentally ill or mentally retarded. Experts on mental illness and retardation testified that this stigma is imposed both outwardly, in that juveniles who have been in institutions encounter substantial obstacles in the community,[21] and inwardly, in that the self-image of the juvenile is almost always severely damaged.[22] Mentally retarded children who are institutionalized are often stigmatized as dangerous and aberrant, thus making their subsequent integration into the community even more difficult. Further, these children are deprived of non-handicapped role models and, as a consequence, tend to adopt behavior patterns which are not socially and culturally appropriate. These behavior patterns may continue after a child is released into the community and, in fact, serve to accentuate the existing community stereotype of the mentally retarded.[23]

[19] Deposition of L. Glenn at 11. By contrast, a person age twenty who suffered brain damage as a result of an automobile accident would not be considered mentally retarded. *Id.*

[20] *Id.* at 9.

[21] *Compare*, Testimony of J. Feiner, Appendix at 474a-75a, *with* Deposition of L. Glenn at 25.

[22] *Compare* Testimony of J. Feiner, Appendix at 474a-75a; Testimony of M. Ingall, Appendix at 595a-96a; and Testimony of E. Messinger, Appendix at 621a-22a *with* Deposition of L. Glenn at 25.

Second, both mental illness and mental retardation are conditions which are subject to error in diagnosis and identification. Experts on mental illness in juveniles repeatedly emphasized that the problems of the juvenile are often closely intertwined with mental and emotional problems of other family members. Irrespective of this fact, the juvenile is often the person isolated as having the mental problems.[24]

Errors in identifying mentally retarded juveniles result from different factors. First of all, certain physical characteristics, *e.g.*, Down's Syndrome, have historically been associated with retardation. However, these associations may not necessarily be accurate. Second, certain physical handicaps may cause a person to be mistakenly labelled mentally retarded. An undetected hearing impairment, for example, may prevent a child from performing well on an I.Q. test. A child who lacks normal motor or speech capabilities, who is unable to communicate or behave like other children, may be mistakenly identified as being retarded.[25]

Third, conflicts between the concerns and interests of the parents, and the best interests of the child frequently arise with respect to both mentally ill and mentally retarded children. Experts on mental illness testified that parents often commit their mentally ill children because of pressures in the home related to the child, or because of the parents' inability to cope with the child's problems

[23] Deposition of L. Glenn at 26-27.

[24] Testimony of J. Feiner, Appendix at 467a-72a; Testimony of M. Ingall, Appendix at 588a-90a; Testimony of E. Messinger, Appendix at 616a-17a.

[25] Deposition of L. Glenn at 13A-14.

and lack of awareness of alternatives to institutionalization.[26] Similarly, parents of mentally retarded children are frequently subject to community pressure to institutionalize their children.[27] Other personal pressures, such as the parents' own emotional difficulties in dealing with the mentally retarded child, as well as the financial problems of providing necessary care, may cause a parent to institutionalize a mentally retarded child although that course is not in the child's best interests.[28] Finally, the parents simply may not be aware of less drastic alternatives to institutionalization.[29] Because of these potential conflicts between the parent and child, experts who testified on behalf of both mentally ill and mentally retarded children were of the opinion that an impartial third party[30] should make the final decision to institutionalize a child, not only for the child's benefit, but also to reduce the trauma and guilt felt by the parents.[31]

Finally, testimony concerning the nature of the deprivation of liberty inherent in institutionalization and the impact of this deprivation upon the individual is similar for both mentally ill and mentally retarded

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[26] Testimony of J. Feiner, Appendix at 472a-73a; Testimony of H. Kandler, Appendix at 553a-54a.

[27] Deposition of L. Glenn at 35-36. For example, parents who have not been exposed to mentally retarded children may become upset when their normal child associates with a mentally retarded child, who the parents perceive as being "different."

[28] *Id.* at 37-42.

[29] *Id.* at 57-58.

[30] The experts did not necessarily agree, however, as to the *identity* of the third party. *Compare e.g.*, Testimony of J. Feiner, Appendix at 478a-79a, *with* Testimony of L. Tashjian, Appendix at 644a-46a, 652a.

[31] Deposition of L. Glenn at 57-58.

children.[32] One expert testified to the "derailment from the usual course of one's life, the dreary regimen even in the most progressive hospitals, the extreme deprivation and limits" which are the effects of institutionalization.[33] Institutions prevent persons from being exposed to normal community experiences and prevent individual growth. With respect to mentally retarded persons, these conditions may be rendered even more acute by the person's inability to protect himself against the dehumanizing effects of institutionalization.[34] Finally, these effects appear to be the same regardless of whether the institution is state-operated or privately-operated; the crucial variable is size.[35]

The ages of the mentally retarded juveniles covered by the 1966 Act range from adolescent to very young. However, we conclude that the same factors hold true irrespective of the child's age. Indeed, the danger of misclassification and the stigma of institutionalization fall more heavily upon the younger child, for whom the decision to institutionalize may effectively foreclose any opportunity to adjust adequately to life in the community. Conversely, there is no evidence to suggest that older mentally retarded juveniles have either a greater or lesser need for procedural due process protection. On the contrary, as with younger juveniles, an older juvenile who is mentally retarded may be functioning under the same disabilities which are pertinent here; that is, he may be unable to read or write, or to under-

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[32] *Compare* Testimony of J. Feiner, Appendix at 474a-75a, and Testimony of E. Messinger, Appendix at 620a-22a *with* Deposition of L. Glenn at 22-24.

[33] Testimony of E. Messinger, Appendix at 621a.

[34] Deposition of L. Glenn at 23-24.

[35] *Id.* at 28. However, the stigma of being labelled mentally ill or mentally retarded remains, regardless of the size of the institution or the actual conditions therein.

stand concepts such as the right to counsel.[36] Therefore we conclude that the need for due process protection and the factors which this Court must consider in determining what process is due, are the same for older and younger mentally retarded juveniles.

V. *Plaintiff Class Action*

Plaintiffs have requested that they be permitted to bring this action on behalf of two classes in accordance with Fed.R.Civ.P. 23(a) and 23(b) (2).[37] One proposed class would consist of juveniles committed as mentally ill and who are under age fourteen; the other class would be juveniles committed as mentally retarded who are

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[36] *Id.* at 64-65.

[37] We approved a defendant class pursuant to Fed.R.Civ.P. 23(a) and 23(b) (2) of "directors of all mental health and mental retardation facilities in Pennsylvania which are subject to regulation by the defendant Secretary of Public Welfare" by Order dated March 28, 1978. *Institutionalized Juveniles v. Secretary of Public Welfare*, C.A. No. 72-2272 (E.D. Pa., March 28, 1978). The defendant class representatives are directors of three state-owned and operated facilities and the Secretary of Public Welfare.

> The parties have stipulated as follows:
>
> All mental health and mental retardation facilities in Pennsylvania which are not state-owned and operated must be licensed and/or approved by the Department of Public Welfare. As part of the approval/licensing, such facilities have been required and are required to utilize and act in conformity with the commitment and admission procedures in both the 1966 Act and the 1976 Act.

Stipulation of Counsel No. 37, Supplementary Exhibit No. 13.

This stipulation serves to buttress our conclusion that there is no conflict between defendant class members because "the challenged statutes and regulations are applicable to all of Pennsylvania's mental health institutions, whether state-owned and operated, or privately-owned." *Institutionalized Juveniles v. Secretary of Public Welfare*, *supra*.

This stipulation also serves to distinguish the case before us

age eighteen or younger. Mindful of the Supreme Court's instructions that we "'stop, look, and listen' before certifying a class in order to adjudicate constitutional claims," we proceed to determine if these proposed classes may be properly maintained.

A. *Mentally Ill Juveniles Under Age Fourteen*

One proposed class consists of all juveniles under the age of fourteen who are subject to inpatient treatment under Article II of the 1976 Act. We conclude that the class meets the requirements of Rule 23.

This class consists of approximately 360 members[38] which is sufficient to meet the numerosity requirements of Rule 23(a).

The question of law common to all class members is the facial validity of those provisions of Article II of the 1976 Act which relate to the voluntary commitment of mentally ill juveniles under the age of fourteen.

Rule 23(a) requires that the claims of the repre-

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from *In Re John S.*, 135 Cal. Rptr. 893 (Ct. App. 1977), where the court held that there was no state action present in a parent's decision to admit their minor child to a private mental hospital. The *John S.* court specifically held that the state "does not control either admissions or treatment policies of the private hospital to which [the] minor was admitted." *Id.* at 901. Therefore, since the parents had not invoked the aid of a state statute in committing their child to a private mental hospital, the state was in no way a party to the parental decision. *Id.* We believe that the situation in Pennsylvania, as reflected by this Stipulation of Counsel, mandates a different conclusion. Since the state actively regulates the admissions procedures of all mental health facilities within the state as part of its licensing power, children who are "voluntarily" admitted to privately-owned facilities are confined pursuant to state law.

[38] See Exhibits A and B to Stipulation of Counsel, Supplementary Exhibit No. 13 (Defendants' Answers to Plaintiffs' Interrogatories).

sentative parties be "typical" and that those parties adequately represent the interests of absent class members. While it has been noted that there is difficulty in distinguishing between the "typicality" and "adequacy" requirements, those two criteria may be taken in concert as requiring that (1) the named plaintiffs be members of the class; (2) the named plaintiffs have no interests antagonistic to those of absent class members; and (3) the named plaintiffs' attorney be qualified, experienced and generally able to conduct the proposed litigation.[39] *See Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975); *Eisen N. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); 3B J. Moore, Federal Practice ¶23.07[1] (2d ed. 1977).

Nine of the named plaintiffs are juveniles committed as mentallly ill who are under the age of fourteen; thus, they clearly are members of the class. There is no conflict between these plaintiffs and absent class members. Each class member, irrespective of that child's age, is confined under the same statutory provisions alleged to be unconstitutional. Therefore we conclude that the class itself is cohesive and free from conflict, and that the representative plaintiffs, through counsel, will adequately and vigorously represent the interests of absent class members.[40]

Finally, the class meets the requirements of Rule 23(b)(2), since "the party opposing the class has acted

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[39] We have no doubts concerning the caliber of representation provided by plaintiffs' counsel, as evidenced by the high degree of competence displayed by counsel throughout the course of this litigation.

[40] Plaintiffs' counsel was appointed guardian *ad litem* for the class in order to alleviate any potential problem caused by the difficulty of the class representatives, persons confined to mental institutions, to fairly and adequately represent the interests of the class. *See Goldy v. Beal*, 429 F. Supp. 640, 649 (M.D. Pa. 1976) (three-judge court).

or refused to act on grounds generally applicable to the class," thereby making declaratory or injunctive relief with respect to the entire class appropriate. *See Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976) (three-judge court). We find, therefore, that this actiom may be maintained as a class action on behalf of all juveniles committed as mentally ill who are under the age of fourteen.

B. *Mentally Retarded Juveniles Age Eighteen Or Younger*

Plaintiffs also seek to maintain this action on behalf of a class of mentally retarded juveniles age eighteen or younger. This entire class is covered by the 1966 Act; however, as noted above, juveniles age thirteen and over are given additional protection by the 1973 Regulations. The Supreme Court expressly posed the question of whether differences between older and younger juveniles might render certification of a class embracing both groups improper. 431 U.S. at 135. Because of our finding that there are no significant differences between older and younger mentally retarded juveniles for due process purposes, and for other reasons stated below, we conclude that the applicable Rule 23 criteria are met.

This class consists of approximately 3,153 member,[41] which is clearly sufficient to meet Rule 23(a)'s numerosity requirement. Of greater concern is the requirement that there be questions of fact and law common to all class members, since mentally retarded juveniles who are thirteen and over are given greater procedural protection pursuant to the 1973 Regulations than younger juveniles. However, the attack mounted here is against the entire statutory scheme, including

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[41] See Exhibits A and B to Stipulation of Counsel, Supplementary Exhibit No. 13 (Defendants' Answers to Plaintiffs' Interrogatories).

both the applicable provisions of the 1966 Act and the 1973 Regulations. We have previously made a finding that, for procedural due process purposes, there are no significant differences between older and younger mentally retarded juveniles. Therefore, if the statutory scheme is unconstitutional with respect to the older juveniles who receive greater protections, then it is *a fortiori* unconstitutional with respect to the younger juveniles who receive far less protection.

The "typicality" and "adequacy of representation" requirements are also met. The named plaintiffs here are all age thirteen or older and are thus given greater protections under the 1973 Regulations than class members under age thirteen. However, all three mentally retarded plaintiffs were admitted to their respective institutions before they reached age thirteen and, therefore, were presumably not accorded the additional procedural safeguards at the date of their admission. Furthermore, we do not believe that the rights accorded to older juveniles following their admission, such as the right to request a hearing on the validity of their confinement, serve to create a conflict between the older and younger juveniles.[42] First of all, we reiterate our conclusion that due process requirements are the same for both groups. Second, we note that, in order for the named plaintiffs to prevail on their claim that the statutory scheme is unconstitutional, it will be necessary for them to prove the unconstitutionality of the statute and regulations as applied to the less protected younger retarded juveniles.[43] Therefore, we conclude that this action is

[42] There is nothing in the record to show whether notice of these additional rights was given to the juveniles at any time after their thirteenth birthday. Indeed, it is unclear from the text of the 1973 Regulations whether they provide that a juvenile who attains the age of thirteen while institutionalized must be given notice of his additional rights at that time. *See* note 10, *supra*.

[43] We do not believe that it is necessary for the class representatives to have interests identical in every respect to all class members in order to adequately represent the class. What is important is that their interests be the same with respect to the rights sought to be asserted. "Whether a party adequately represents a class depends on all the circumstances of the particular case." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975) (former employees who voluntarily terminate their employment are able to represent adequately a class of presently employed persons, absent a showing of genuinely antagonistic interests.) Where, as here, there is no conflict between the interests of the representative plaintiffs and the absent class members, and the circumstances clearly demonstrate that the representative plaintiffs will vigorously assert the interest of all class members, we believe that the class action is properly maintained.

properly brought on behalf of a class of mentally retarded juveniles age eighteen or younger.

VI. *Discussion*

In our original decision, we concluded that the plaintiffs had a liberty interest, protectible under the Fourteenth Amendment, in not being institutionalized without due process of law. 402 F. Supp. at 1046. Encompassed within this liberty interest is not only protection against physical restraint and confinement, but also protection of the juvenile's "good name, reputation, honor, [and] integrity." *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), *cited in Bartley v. Kremens*, *supra*, 1046 n. 8. The protection of the plaintiffs' reputation interest is implicated because of the stigma attached to institutional commitment, a stigma which "may render civil commitment a more lasting abridgement of personal freedom than imprisonment for a crime." *Id.* at 1046. We reaffirm these conclusions.

We further determined that this liberty interest could not be waived by plaintiffs' parents, guardians, or persons standing *in loco parentis*. *Id.* at 1047. There may be instances where the congruence between the parents' interests and those of the child assure that the

parents will arrive at a decision based upon the best interests of the child.[44] The evidence in this case overwhelmingly demonstrates that, due to the substantial potential for conflict between the interests of the parent and the child, this is not such a situation. *See New York State Association for Retarded Children v. Carey*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973); *cf Horacek v. Exxon*, 357 F. Supp. 71, 74 (D. Neb. 1973).

It has been argued that the parents' determination that institutionalization is the appropriate treatment for a child believed to be mentally ill or retarded is no different from the deicsion to provide any other type of medical treatment. We disagree. Unlike other kinds of medical treatment, a substantial stigma attaches to institutionalization. This stigma coupled with the substantial danger of error in the diagnosis of mental illness and mental retardation, and the greater potential for long-term loss of liberty[45] create a situation substantially different from the treatment of other medical conditions. Furthermore, we perceive little or no parent-child conflict in the decision to give or withhold other kinds of medical treatment since a parents' interests are more likely to be similar to the best interests of the child. Therefore, we reaffirm our holding that parents may not waive the constitutional right of their child not to be deprived of liberty without due process of law.

We then turned to a consideration of what process was due. In responding to plaintiffs' allegation that they were deprived of certain specific procedural rights, we concluded that the juvenile plaintiffs were entitled to

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[44] We do not mean to imply, however, that in such a case parents necessarily would have the right to waive the constitutional rights of their children.

[45] The testimony demonstrated that, with respect to mentally retarded children, the decision to institutionalize is often a long-term or even life decision. Deposition of L. Glenn at 52-53.

> (1) a probable cause hearing within seventy-two (72) hours from the date of their initial detention; (2) a post-commitment hearing within two (2) weeks from the date of their initial detention; (3) written notice,[46] including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment; (4) counsel at all significant stages of the commitment process and if indigent the right to appoint free counsel;[47] (5) be present at all hearings concerning their proposed commitment; (6) a finding by clear and convincing proof that they are in need of institutionalization; (7) the rights to confront and cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses.[48]

402 F. Supp. at 1053. While we set forth these detailed procedures, we also stated, "Our action is not intended to preempt the state which is free to develop its own

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[46] Because of those cases where notice to the child might be meaningless, we found that, "until some other procedure is established, this notice shall be sent not only to the child but also to the Clerk of the Court with jurisdiction and shall be forwarded to the child's attorney." 402 F. Supp. at n. 19.

[47] It may not always be necessary to appoint a lawyer so long as a substitute procedure adequately protects the child's interests. For example, it may be sufficient to appoint a guardian, trained in the mental health field, who would advocate the child's interests or alternatively, have the power to retain a lawyer to do so. The important point is that the child must have a capable advocate who has the sole responsibility of advancing the child's best interests. However, until alternative procedures are designed which will adequately protect the child's interests, we adhere to our conclusion that counsel is required.

[48] We further noted that "we neither intend nor expect that all of these procedures will be required every time an attempt to institutionalize a child is made." 405 F. Supp. at n. 26. Except with respect to the right to notice and counsel, we concluded that "any or all of these rights may be waived by the child and the unbiased tribunal may accept such a waiver upon approval by the child's counsel and

safeguards so long as they are as fully effective as those which we set out." *Id.* at n. 16, *citing Miranda v. Arizona,* 384 U.S. 436 (1966) and *Morrissey v. Brewer,* 408 U.S. 490 (1971). To rephrase Judge Friendly, there is no single correct solution to the problem of safeguarding the interests of the juvenile plaintiffs; "more of one procedural safeguard may justify less of another." Friendly, *Some Kind of Hearing,* 123 U.Pa.L.Rev. 1267, 1302 (1975).

We reaffirm these conclusions, and make the following additions and clarifications. First, we reiterate the need for a hearing in all cases unless there is a valid waiver. The Supreme Court has dictated that, in identifying the specific contents of due process, three factors must be considered: the private interest involved, the risk of erroneous deprivation, and the Government's interest, including any fiscal and administrative burdens that the additional procedures would entail. *Smith v. O.F.F.E.R.,* 431 U.S. 816 (1977); *Mathews v. Eldridge,* 424 U.S. 319 (1976). The juvenile's interest here is weighty, and the risk of erroneous deprivation, as noted earlier, is great.[49] We believe that a hearing would insure that the interests

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upon a finding that the child understands his rights and is competent to waive them." *Id.* We further concluded that, in the case where a child is unable to understand his rights, the attorney may waive these rights, and "the unbiased tribunal may accept the waiver upon a finding that the waiver is appropriate." *Id.*

[49] The Supreme Court recently emphasized the importance of preventing erroneous deprivations of protected rights, stating:

> Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process. . . ."

Carey v. Piphus, 46 U.S.L.W. 4224, 4227 (March 21, 1978) (citations omitted).

of the child are clearly represented, that alternatives to institutionalization are fully explored, and that the decision to commit the child is impartially made.[50] *See J.L. v. Parham,* 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court); *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974).

Several issues should be considered at the hearing. First, the unbiased tribunal should determine whether, in fact, the child is mentally ill or mentally retarded. If this determination is affirmative, the tribunal should proceed to determine if commitment is necessary, if it will be beneficial to the child, and if it is the least restrictive alternative. *J.L. v. Parham, supra; Halderman v. Pennhurst State School and Hospital,* C.A. No. 74-1343 (E.D. Pa., December 23, 1977). Where the state sanctions the restriction of child's liberty rights, such restriction should intrude upon those rights to the smallest possible degree necessary for the achievement of the purposes of the restriction. *Shelton v. Tucker,* 364 U.S. 479 (1960). *See Halderman v. Pennhurst State School and Hospital, supra,* and cases cited therein. While the tribunal should make findings to support its determination, these findings need not necessarily be made formally. It is crucial, however, that the tribunal make a good faith, independent determination that the above criteria are met before a juvenile is confined.

We reject the argument that a hearing should not be required because it might prove traumatic for the child. First of all, the expert testimony, for the most part, demonstrated that the effects of a hearing on the child and, in many cases, the parent would be beneficial.[51] For example, one expert testified, with respect

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[50] Several experts testified concerning the function that a hearing would serve. *See, e.g.,* Deposition of L. Glenn at 55-59; Testimony of E. Messinger, Appendix at 623a-25a.

[51] Several experts testified that a hearing would serve a thera-

to mentally retarded children, that a hearing would enhance feelings of dignity and self-worth in the child, reduce the guilt feelings of the parents, and reduce interfamilial conflicts, if any exist, over whether the decision to commit the child is correct.[52] Secondly, we note that the attorney representing the child has the option of waiving the child's presence at the hearing if there is a potential for trauma, and the court may accept such waiver where the child's interests are not compromised. Finally, any danger of trauma pales beside the potential severity of the deprivation of liberty suffered by a child needlessly institutionalized. *See Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971) (three-judge court).

Finally, with respect to the nature of the tribunal, we state only that the tribunal must be neutral and unbiased. It is clear that "an unbiased tribunal is a necessary element in every case where a hearing is required." Friendly, *Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267, 1279 (1975). Whether the tribunal should be judicial or administrative is not a matter best resolved by this Court at this time.[53]

In view of the guidelines set forth above, we turn to the specific provisions attacked here; namely, the 1973 Regulations and the 1976 Act.

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peutic function in some instances, in that the child would thereby be assured that the decision to commit him was made fairly and impartially. Testimony of J. Feiner, Appendix at 483a-84a; Testimony of H. Kandler, Appendix at 544a.

[52] Deposition of L. Glenn at 56-57.

[53] In our initial opinion, we stated, "Until the legislature acts to establish an unbiased tribunal to conduct the probable cause and final hearing the present facilities of the Commonwealth court system shall be used for these hearings." 402 F. Supp. at 18.

We have reconsidered this portion of our original opinion and conclude that the more prudent course of action is to permit the Commonwealth to determine what kind of "unbiased tribunal" should conduct these hearings.

a. *1973 Regulations*

As outlined above, these regulations augment the procedures of the 1966 Act, giving certain procedural rights to all juveniles and other additional rights to juveniles age thirteen and over. Since the passage of the 1976 Act, these provisions apply only to those juveniles who are mentally retarded. We conclude that these 1973 Regulations are not in accord with the requirements of due process.

One of the major deficiencies[54] of the 1973 Regulations is the absence of a procedure designed to achieve informed, impartial admissions. Under the Regulations, a juvenile under the age of eighteen may be admitted to an institution upon the referral of either a pediatrician, general physician, or psychologist[55] with the concurrence of the Director of the Institution.[56] The referring pediatrician or general physician may have no knowledge or training whatsoever concerning the problems of mental retardation,[57] while the Director of the Institution, who

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[54] This discussion is not meant to be an exclusive listing of the procedural deficiencies of the 1973 Regulations. To the extent that the Regulations do not fulfill the requirements stated elsewhere in the text, we hold that they are unconstitutional.

[55] Under the 1973 Regulations, a mentally retarded juvenile may be referred to either a "recognized medical facility, Mental Health/Mental Retardation therapist or Mental Health Agency. . . . a pediatrician, or general physician or psychologist."

The Regulations required that referral of mentally ill juveniles, no longer covered under the Regulations, be accompanied by a psychiatric evaluation, stating "with specificity the reasons that the person requires institutional care." However, the 1973 Regulations permit "a medical or psychological evaluation" to accompany the referral of a mentally retarded juvenile. Further, it is not clear whether these "medical or psychological evaluations" must state the reasons for institutionalization "with specificity."

[56] The Regulations require the Director of the Institution to conduct his own independent examination of the juvenile.

[57] Plaintiff's expert on mental retardation testified that, since

has interests different from those of the child, may be placed into a position of conflict in making the decision to commit.[58] There is no assurance what-so-ever that the interests of the child will be weighed in making this decision. Therefore, this procedure does not provide the protections furnished by hearing before an "unbiased tribunal".

As for the additional procedural rights given to children age thirteen and older, we conclude that there are severe deficiencies in these procedures as well. First of

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mental retardation is not a medical problem, physicians typically are not familiar with developments in the delivery of services to mentally retarded persons. Deposition of L. Glenn at 49. Other mental health professionals often make institutional referrals because of the pressures on them to find rapid placement for mentally retarded children. *Id.* at 50-51.

[58] Many of the experts commented on the conflict of interest which faces the Director of a mental institution in this context. *See e.g., id.* at 46; Testimony of E. Messinger, Appendix at 629a-30a. Dr. Messinger summarized these conflicts as follows:

> [P]sychiatrists are people, too, and we are influenced by considerations other than those that are strictly clinical. For example, if I, as director of a state hospital get a letter from a colleague in a community facility, saying that John Doe really needs psychiatric hospitalization and is severely disturbed, even if I felt otherwise from a direct discussion with the patient, I would be in an awkward position if I said, "No, this patient does not require hospitalization." What do I then say to my colleague whose opinion I disagreed with?
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> Secondly, professionals—psychiatrists who work for institutions, are influenced by the needs of the institution, as well as the needs of the individual patient. If I am the director of and adolescent service and the funding of my unit depends on how fully utilized the unit is, I might be on the side of admitting the adolescent. I am not saying this is done deliberatly, but I think that a decision as complex as hospitalization is influenced by factors within the psychiatrists at a number of different levels and such considerations as bed utilization will play some role.

Id.

all, the mentally retarded child who receives written notice may not be able to read the notice or comprehend the explanation of his rights contained therein. Assuming that the child does understand the notice, however, the burden of commencing the enumerated procedures rests with the juvenile; he must contact counsel or object to the institutionalization. As one of the experts testified, "It's putting an awful lot of burden on young retarded persons to stand up against a big institution." Deposition of L. Glenn, at 67. Once the child protests, there is no set time limit in which a hearing must be held. We believe that, especially in the case of retarded children, who may lack the ability to understand the notice given to them, due process rights are violated in the absence of an automatic post-commitment hearing, to be scheduled within a reasonable time, and the presence of counsel to speak solely for the child's interests.[59] Therefore, we hold that the 1973 Regulations fall short of the minimum due process requirements we outlined above.

b. *1976 Act*

Article II of the 1976 Act, as noted above, specifies certain procedures for the voluntary "inpatient treatment" of mentally ill juveniles who are age thirteen or younger. We believe that these procedures do not meet due process standards.

We will note specifically several of the deficiencies of the 1976 Act. The major deficiency is the absence of a required post-commitment hearing to be held within a reasonable time after commitment and the absence of counsel to advocate the interests of the child.[60]. We

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[59] We in no way imply, however, that the other rights we have enumerated do not also apply.

[60] The Act does provide that "an individualized treatment plan" be formulated by a "treatment team." The Act further states that

believe that these procedural requirements are especially critical where, as here, the rights of very young children may be implicated. These mentally ill children may lack the ability and capacity to speak on their own behalf, as an older juvenile might be able to do, and their interests may be overlooked.[61]

The procedures governing withdrawal from inpatient treatment in no way cure the defects of the statute. Section 206(b) provides that "any responsible party" may petition the Juvenile Division of the Court of Common Pleas for the modification of or withdrawal from treatment, and at that time, a hearing will be held. Thus, again, rather than providing for automatic procedures aimed at protecting against an unconstitutional deprivation of liberty, the statutory scheme places the burden upon a "responsible party" to initiate the procedures to which the juvenile is entitled. This type of statutory scheme is unacceptable.

"A treatment team must be under the direction of either a physician or a licensed clinical psychologist and may include other mental health professions." 50 P.S. § 7106. There is no assurance of the treatment teams' independence from the inpatient facility into which the child is being committed; and, in fact, the medical records of the named plaintiffs in this case appear to demonstrate that the members of the treatment team are employed by or associated in some way with the admitting institution. Therefore, we believe that this portion of the 1976 Act is essentially no different from the similar requirement of the 1972 Regulations that the Director of the Institution examine all juveniles referred to him before admitting them.

[61] One of the experts testified, with respect to mentally ill juveniles

> I think in fact that the need for a hearing in the younger children is greater, because one cannot expect them to understand fully, certainly in legal terms, their dilemma, nor can they be aware of alternative forms of therapy. . . .I think that because younger children are less sophisticated and less knowledgeable, that we have to bend over backwards to protect their rights.

Testimony of E. Messinger, Appendix at 631a.

Accordingly, we declare that the procedures for voluntary commitment of mentally ill and mentally retarded juveniles, as set forth in the 1966 Act, the 1973 Regulations, and the 1976 Act, are unconstitutional on their face and as applied to plaintiffs, and enjoin their enforcement.[62]

We continue to retain jurisdiction over this action, as we have the inherent power to do. This will enable the parties to apply for amendment or modification of the Order if they deem it necessary.[63]

(s) John J. Gibbons
C.J.
(s) Daniel H. Huyett 3rd
D.J.

Honorable Raymond J. Broderick dissents and will file a dissenting opinion.

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[62] The foregoing shall constitute findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a).

[63] We have issued a detailed Order in compliance with Fed.R. Civ.P. 65(d) and the Supreme Court's decision in Schmidt v. Lessard, 414 U.S. 473 (1974).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES in Pennsylvania institutions for the mentally ill and the mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S.; by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated.

v. Plaintiffs

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representatives of all others similarly situated

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Defendents

CIVIL ACTION NO. 72-2272

ORDER

NOW, May 25th, 1978, for the reasons set forth in the accompanying Opinion, IT IS ORDERED that judgment is entered in favor of plaintiffs and against defendants. In accordance with Fed.R.Civ.P. 58 and 65(d), we set forth below the terms of the injunctive relief granted.

CLASS ACTION

1. This action is properly maintained as a class action under Fed.R.Civ.P. 23 (b) (2). Two classes are represented by the named plaintiffs:

(a) all juveniles committed as mentally ill to mental health facilities in Pennsylvania who are under the age of fourteen;

(b) all juveniles committed as mentally retarded to mental health facilities in Pennsylvania who are age eighteen or younger.

2. This action is properly maintained as a defendant class action under Fed.R.Civ.P. 23(b) (2). The class represented by the the named defendants includes directors of all mental health and mental retardation facilities in Pennsylvania which are subject to regulation by the defendant Secretary of Public Welfare.

DECLARATION JUDGMENT

3. Section 402(a) (2), section 402(c) and section 403(a) (2) of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (1966 Act) are declared to be unconstitutional on their face and as applied under the due processs clause of the Fourteenth Amendment to the United States Constitution.

4. Section 201, section 206(b), and, to the extent that it applies to juveniles under the age of 14, section 205 of the Mental Health Procedures Act of 1976 (1976 Act) are declared to be unconstitutional on their face and as applied under the due process clause of the Fourteenth Amendment to the United States Constitution.

5. These sections of the 1966 Act and the 1976 Act are declared invalid in that they fail to require that mentally retarded juveniles eighteen years of age or younger and mentally ill juveniles under the age of fourteen receive prior written notcie of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the juvenile's attorney or other trained representative must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing.

Counsel

6. These sections of the 1966 Act and the 1976 Act are declared invalid in that they fail to require during all significant stages of the commitment process counsel or other trained representative for mentally retarded juveniles eighteen years of age or younger and mentally ill juveniles under the age of fourteen; or if the child is indigent, the appointment of free counsel or other trained representative.

Presence of Child

7. These sections of the 1966 Act and the 1976 Act are declared invalid in that they fail to afford to mentally retarded juveniles eighteen years of age or younger and mentally ill juveniles under the age of fourteen who are subject to commitment hearings the rights to be present with counsel or other trained representative, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and the opportunity to offer the testimony of witnesses and other evidence on their own behalf.

Standard of Proof

8. These sections of the 1966 Act and the 1976 Act are delcared invalid in that they fail to require that the fact finder in a full hearing on the commitment of a mentally retarded juvenile eighteen years of age or younger or a mentally ill juvenile under age fourteen, find by clear and convincing proof that the juvenile is in need of institutionalization.

Probable Cause Hearing

9. These sections of the 1966 Act and the 1976 Act are declared invalid in that they permit detention of mentally retarded juveniles eighteen years of age or younger and mentally ill juveniles under age fourteen for more than seventy-two (72) hours without a hearing

to test whether there is probable cause to believe institutionalization is necessary. These sections of the Act are further declared invalid in that they fail to provde at a probable cause hearing the rights delineated in paragraphs 5 through 7 above.

Full Commitment Hearing

10. These sections of the 1966 Act and the 1976 Act are declared invalid in that in the event the initial hearing determines the existence of probable cause, they fail to afford to mentally retarded juveniles eighteen years of age or younger or mentally ill juveniles under age fourteen a full hearing on the need for commitment within two years of age or younger or mentally ill juveniles under age fourteen a full hearing on the need for commitment within two weeks from the date of initial detention. These sections of the Act are further declared invalid in that they fail to provide at a full commitment hearing the rights delineated in paragraphs 5 through 8 above.

Regulations

11. The regulations promulgated by defendant Secretary of Public Welfare to supplement the 1966 Act, published at 3 Pa.Bull. 1840 (1973 Regulations), are declared invalid and in violence of the due process clause of the Fourteenth Amendment to the United States Constitution in that they fail to require for all mentally retarded juveniles eighteen years of age or younger the rights delineated in paragraphs 4 through 9 above.

Admissions and Commitments of Plaintiffs

12. It is declared that all mentally retarded juveniles eighteen years of age or younger admitted or committed to mental health or mental retardation facilities in Pennsylvania under the enumerated sections of the 1966 Act are unconstitutionally held and detained.

13. It is declared that all mentally ill juveniles under age fourteen admitted to mental health facilities in Pennsylvania under the enumerated sections of the 1976 Act are unconstitutionally held and detained.

Application for Treatment of Juveniles

14. It is declared that a parent, guardian, or person standing *in loco parentis* may initiate the temporary detention of a mentally retarded juvenile eighteen years of age or younger or a mentally ill juvenile under age fourteen in a mental health or mental retardation facility if the procedures and requirements of our Opinion and Order are fully complied with.

Requirements for Commitment

15. It is declared that all mentally retarded juveniles eighteen years of age or younger and mentally ill juveniles under age of fourteen, who have been, are, or may be subject to admisssion or commission to a mental health or mental retardation facility in Pennsylvania are entitled to:

Notice

A. Prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the juvenile's attorney or other trained representative must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the Legislature establishes some other procedure consonant with our Opinion and Order, this notice must be sent not only to the juvenile but also to the Clerk of the Court with jurisdiction to be forwarded to the juvenile's attorney.

Counsel

B. Counsel or other trained representative during all significant stages of the commitment process; if the

juvenile is indigent, counsel or other trained representative shall be provided for free.

Presence of Juvenile and Other Hearing Rights

C. Presence of the juvenile at all commitment hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the juvenile's behalf.

Standard of Proof

D. A finding by clear and convincing proof at the full commitment hearing that the juvenile is in need of institutionalization.

Probable Cause Hearing

E. A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

Full Commitment Hearing

F. A full commitment hearing within two (2) weeks from the date of the initial detention.

Waiver

16. Excepting the rights to notice and to counsel or other trained representative, any or all of the rights delineated in paragraph 15 may be waived by the juvenile, and the neutral tribunal may accept such a waiver upon approval by the juvenile's counsel or other trained representative and upon a finding that the juvenile understands his rights and is competent to waive them. Because there may be situations where the juvenile either does not understand his rights or is not competent to waive them, any or all of these rights, excepting the rights to notice and to counsel or other trained representative, may also be waived by the juvenile's attorney or representative.

and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

INJUNCTIVE RELIEF

17. It is ordered that the operation of section 402(a)(2), section 402(c), and section 403(a)(2) of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (1966 Act) is enjoined in that these sections of the 1966 Act are unconstitutional on their face and as applied under the due process clause of the Fourteenth Amendment to the United States Constitution. It is further ordered that the defendants and their officers, agents, servants, employees, successors, and those persons in active concert or participation with them are enjoined:

Procedures

A. To refrain from accepting or continuing the admission or commitment of any juvenile eighteen years of age or younger under the 1966 Act to any mental health or mental retardation facility unless the juvenile is or has been provided:

(1) Prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the juvenile's attorney or other representative must be in receipt of notice at least forty-eight (48) hours prior to the initial hearings. Until the Legislature establishes some other procedure consonant with our Opinion and Order, this notice must be sent not only to the juvenile but also to the Clerk of the Court with jurisdiction to be forwarded to the juvenile's attorney or other trained representative.

(2) Counsel or other trained representative during all significant stages of the commitment process; if the juvenile is indigent, counsel or other trained representative shall be provided free.

(3) Presence of the juvenile at all commitment

hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the juvenile's behalf.

(4) A finding by clear and convincing proof at the full commitment hearing that the juvenile is in need of institutionalization.

(5) A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

(6) A full commitment hearing within two (2) weeks from the date of the initial detention.

Excepting the rights to notice and to counsel or other trained representative, any or all of the rights delineated in paragraph 16(a) may be waived by the juvenile, and the neutral tribunal may accept such a waiver upon approval by the juvenile's counsel or other trained representative and upon a finding that the juvenile understands his rights and is competent to waive them. Because there may be situations where the juvenile either does not understand his rights or is not competent to waive them, any or all of these rights, except the rights to notice and to counsel or other trained representative may also be waived by the juvenile's attorney or other representative, and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

18. It is ordered that the operation of section 201, section 206(b), and, to the extent that it applies to juveniles under the age of fourteen, section 205 of the Mental Health Procedures Act of 1976 (1976 Act) is enjoined in that these sections are unconstitutional on their face and as applied under the due process clauses of the Fourteenth Amendment of the United States Constitution. It is further ordered that the defendants and their officers, agents, servants, employees, successors, and those per-

sons in active concert or participation with them are enjoined:

Procedures

A. To refrain from accepting or continuing the admission or commitment of any juvenile under the age of fourteen under the 1976 Act to any mental health or mental retardation facility unless the juvenile is or has been provided:

(1) Prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the juvenile's attorney or other representative must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the Legislature establishes some other procedure consonant with our Opinion and Order, this notice must be sent not only to the juvenile but also to the Clerk of the Court with jurisdiction to be forwarded to the juvenile's attorney or other representative.

(2) Counsel or other trained representative during all significant stages of the commitment process; if the juvenile is indigent, counsel or other representative shall be provided free.

(3) Presence of the juvenile at all commitment hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the juvenile's behalf.

(4) A finding by clear and convincing proof at the full commitment hearing that the juvenile is in need of institutionalization.

(5) A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

(6) A full commitment hearing within two (2) weeks from the date of the initial detention.

Excepting the rights to notice and to counsel or other trained representative, any or all of the rights delineated in paragraph 17(A) may be waived by the juvenile, and the neutral tribunal may accept such a waiver upon approval by the juvenile's counsel or other representative and upon a finding that the juvenile understands his rights and is competent to waive them. Because there may be situations where the juvenile either does not understand his rights or is not competent to waive them, any or all of these rights, excepting to notice and to counsel or other trained representative may also be waived by the juvenile's attorney or other representative, and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

19. It is further ordered that the defendant Secretary of Public Welfare and its officers, agents, servants, employees, successors, and those persons in active concert, or participation with them are enjoined:

Regulations

A. To promulgate and issue regulations and to publish them within sixty (60) days as immediately effective, requiring that all mental health and mental retardation facilities in Pennsylvania (see 50 P.S. §4102 and §7103 for the definition of "facility") adhere to the Opinion and Order in this action.

Notice of Order

B. To give notice forwith to all state school and mental hospital directors and their delegates and all directors of all other mental health and mental retardation facilities in Pennsylvania of the Opinion and Order in this action.

Procedures for Children Already Admitted or Committed

C. To initiate procedures, commencing immediately, to assure that all juveniles eighteen years of age

or younger already admitted or committed pursuant to §§ 402 and 403 of the 1966 Act and all juveniles under age fourteen committed pursuant to § 201 of the 1976 Act are either discharged or released or recommitted according to the procedures required by our Opinion and Order. Such discharge, release, or recommitment shall begin immediately and shall be concluded within one hundred and eighty (180) days of the date of this Order, unless an extension is granted by this Court for good cause shown. Notation shall be made upon the medical records of such juveniles that their discharge, release, or recommitment was effected pursuant to the Opinion and Order in this action.

Reports on Implementation

D. To report to this Court within ninety (90) days and again within two hundred and ten (210) days on the steps taken and progress made in the implementation of our Opinion and Order. The two hundred and ten-day report shall describe, for each mental health or mental retardation facility, the number of juveniles released, discharged or recommitted.

(s) John J. Gibbons
C.J.
(s) Daniel H. Huyett 3rd
D.J.

COMPLAINT--MAY 25, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INSTITUTIONALIZED JUVENILES in Pennsylvania institutions for the mentally ill and mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S.; by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Plaintiffs

v.

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representatives of all others similarly situated,

Defendants

Civil Action No. 72-2272

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Commonwealth of Pennsylvania Defendants, Secretary of Public Welfare, Commonwealth of Pennsylvania; John Fong, Director of Haverford State Hospital; Nicholas D'Aluisio, Director of Polk State School and Hospital; and C. Duane Youngberg, Director of Pennhurst State School and Hospital, hereby appeal to the Supreme Court of

the United States, from the Judgment and Final Order entered in this matter on May 25, 1978.

(s) NORMAN J. WATKINS
Deputy Attorney General

Dated: May 25, 1978

J. JUSTIN BLEWITT, JR.
Deputy Attorney General

ROBERT P. KANE
Attorney General

Attorneys for Commonwealth Defendants